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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 1814, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

JACKSON ENGINEERING COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether under Section 8 of the National Labor Relations Act, 29 U.S.C. 158, common law principles of agency may be applied to impute to a labor organization the concealed criminal acts of an officer in accepting illegal employer payments under 29 U.S.C. 186 (b) when there is no substantial evidence that the officer intended to benefit the labor organization.

2. Whether a labor organization may be found to have violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A) solely on the basis of the concealed criminal acts of an officer, despite a finding by the Board that at all times the labor organization vigorously represented an uncoerced majority of the employer's employees.

3. Whether a labor organization must, when a union officer is accused of accepting employer payments in violation of 29 U.S.C. 186(b), act contrary to the national labor policy and discipline that officer or risk a judgment that it ratified and condoned the officer's criminal acts.

4. Whether the Board exceeded its jurisdiction by applying typical unfair labor practice remedies in an atypical fashion in order to redress the criminal conduct of an officer of a labor organization.

PARTIES

The petitioner, Local 1814, International Longshoremen's Association, AFL-CIO, is an unincorporated labor organization representing longshoremen and allied craft workers in the Port of New York. It is a subordinate unit of the International Longshoremen's Association, AFL-CIO.

In accordance with Rule 21(b), it should be noted that all of the parties in the court below are listed in the caption. Jackson Engineering Company, Inc. has not petitioned for a writ of certiorari.

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NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Local 1814, International Longshoremen's Association, AFL-CIO, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit enforcing an order of the National Labor Relations Board ("Board") which, upon a finding that

the petitioner violated Section 8(b)(1)(A) of the National Labor Relations Act ("Act"), 29 U.S.C. 158 (b)(1)(A), directed withdrawal of employer recognition, abrogation of the collective bargaining agreement between the petitioner and the employer and petitioner's reimbursement of dues and initiation fees to employees of the employer.

OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-47a) is not yet officially reported.

JURISDICTION

The Court of Appeals filed its opinion and entered judgment against petitioner on May 15, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied, without opinion on July 23, 1984. A copy of the orders of denial are printed at App. B, *infra*, 48a-49a. By its order of August 17, 1984, the Court of Appeals stayed issuance of its mandate, under Fed. R. App. P. 41, pending application to this Court for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.*, the Labor Management Relations Act, 29 U.S.C. 141 *et. seq.* and the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504 are set forth in App. E, *infra*, 125a-128a.

STATEMENT

This case has its origins in a jurisdictional dispute between the petitioner and Local 17, IUMSWA over the representation of employees of the Jackson Engineering Company, Inc. ("Jackson" or the "employer") with which the petitioner had

a previous and ongoing collective bargaining relationship.[1] After unsuccessfully pleading its case under the AFL-CIO's jurisdictional dispute resolution procedures, Local 17 filed unfair labor practice charges against the petitioner and Jackson alleging violations of Sections 8(b)(1)(A) and 8(a)(1)(2), respectively, of the National Labor Relations Act, as amended, ("Act"), 29 U.S.C. 158 (b)(1)(A), (a)(1)-(2).

A complaint issued and, subsequently, the Board's General Counsel issued an amended complaint focusing on concealed payments made by the president of Jackson (Seregos) to the petitioner's vice-president (Anastasio) as a commission for referring ship repair work to Jackson. Those concealed payments violated Section 302(b) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. 186(b).[2]

After full hearings, the Board's Administrative Law Judge ("ALJ") found that Seregos was acting as Jackson's agent when he made the concealed payments and that Anastasio was acting as the petitioner's agent when he accepted them. The ALJ concluded that Seregos' payments violated Section 8(a)(2) of the Act, which prohibits interference with the administration of any

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[1] Prior to 1975, Jackson's employees were not represented by any labor organization. In September 1975, the petitioner's predecessor, Local 1277-1, ILA, obtained signed authorization cards from a majority of Jackson's employees and Jackson, thereupon, recognized the union as the exclusive bargaining representative for its employees. Effective November 3, 1975 through November 3, 1978, Jackson was party to an industry-wide collective bargaining agreement between the petitioner's predecessor and other ship repair companies. In March 1978, Local 1277-1, ILA merged into the petitioner labor organization. Jackson was also party to the succeeding industry agreement which became effective in November, 1978. App. C, *infra*, 53a-57a.

[2] Anthony Scotto and Anthony Anastasio, the president and vice-president, respectively, of the petitioner labor organization, were prosecuted and convicted under 18 U.S.C. 1962(c)(d), for conducting and conspiring to conduct the affairs of an enterprise (union) through a pattern of racketeering activity predicated upon multiple misdemeanors under 29 U.S.C. 186(b), each of which consisted of the receipt of money from an employer paid without intent to influence the officers in respect to any of their actions, decisions or duties. See *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). The predicate Section 186(b) offenses are non-*mens rea* misdemeanors. *United States v. Ryan*, 350 U.S. 299, 305 (1956); *United States v. Ricciardi*, 357 F.2d 91 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966).

labor organization or the contribution of financial or other support to it, and that Anastasio's acceptance of the concealed payments violated Section 8(b)(1)(A), which makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their statutory rights. The relief recommended by the ALJ was limited, however, to a cease and desist order that Jackson would not thereafter make concealed payments to the petitioner and that the petitioner would not thereafter receive such payments, and to the posting of notices to that effect. App. C, *infra*, 109a-110a.

Subsequently, the Board issued its Decision and Order affirming, *inter alia*, the ALJ's findings of fact and conclusion that the concealed payments violated Sections 8(a)(2)-(1) and 8(b)(1)(A) of the Act. The Board further found that the parties' modification of an existing collective bargaining agreement to accommodate the establishment of a new shipyard operation was "tainted" by the illegal concealed payments. Based on that finding, the Board drastically expanded the scope of the remedy to include: (1) withdrawal of employer recognition of the petitioner; (2) abrogation of the collective bargaining agreement, as modified; and (3) the refund of all dues and initiation fees to employees of the employer who joined the Union after the effective date of the modification agreement. App. D, *infra*, 115a-119a.

Both the petitioner and Jackson petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Board's Decision and Order. The Board moved for consolidation of the two cases and for enforcement of its order.

The Court of Appeals, with one judge dissenting, held that the Board's order should be enforced. A petition for rehearing and suggestion for rehearing *en banc* was denied. App. B, *infra*, 48a-49a.

REASONS FOR GRANTING THE PETITION

1. The court below characterized the issues raised in this case as "legal questions of considerable importance and some novelty." App. A, *infra*, 2a. Its decision, with Wald, J. dissenting, is of equal significance by virtue of its inevitable impact upon the continued viability of the fundamental premises of the National Labor Relations Act.

The indisputable core of the Act is the right of workers to bargain collectively through representatives chosen by a majority. 29 U.S.C. 157, 159(a), *Conair Corp. v. NLRB*, 721 F.2d 1355, 1381-82 (D.C. Cir. 1983), App. A, *infra*, 4a. The decision below affirms a decision and order of the Board (App. D, *infra*) which effectively eviscerates that policy by an *ad hoc* and tortuous application of the principles of ordinary agency law to achieve a desired result, i.e. the remediation of what the Court of Appeals described as a "... truly stark case of corruption in labor-management relations." App. A, *infra*, 2a. It falls to this Court to reaffirm the national labor policy and reject the substitution of the Board's "big brother" judgment for a majority of employees' express choice of collective bargaining representative. *See Conair, supra* 721 F.2d at 1379.

The court below held that the acceptance of employer payments by two of the petitioner's highest officers in violation of 29 U.S.C. 186(b) could properly be attributed to the Union and, thereby, serve as predicates for the unfair labor practice charged. App. A, *infra*, 3a. It based its imputation of liability to the Union for the criminal acts of its officers upon the application of the "scope of employment" doctrine and a finding that the Union "benefitted" by Anastasio's acceptance of payments from Seregos. App. A, *infra*, 19a, 21a-23a.

In determining whether the acts of an individual may be imputed to a labor organization, the Board is bound by the "ordinary law of agency." *Int'l Longshoremen and Warehousemen's Union*, 79 N.L.R.B., 1487 at 1507, quoting 93 Cong. Rec. 7001 (June 12, 1947) (remarks of Sen. Taft). Ordinary agency law recognizes that an act may be within the scope of employment even though it is criminal. *See* RESTATEMENT (Second) OF AGENCY Section 231 (1958). However, a criminal act by an employee is *not* within the scope of employment if it is not done to benefit the employer. *See id.* Section 235. The act of any institution's employees or officers may be imputed to the institution only when "it is actuated, at least in part, by a *purpose* to serve the [institution]." *See id.* Section 228 (1)(c). *See also International Distribution Corp. v. American District Telephone Co.*, 569 F.2d 136 (D.C. Cir. 1977); *Park Transfer Co. v.*

Lumberman's Mutual Casualty Co., 142 F.2d 100 (D.C. Cir. 1944); *Melton v. United States*, 488 F.Supp. 1066 (D.D.C. 1980).

In this case, the *sine qua non* to a determination that Jackson violated Section 8(a)(1)-(2) and the petitioner, Section 8(b)(1)(A), is a finding, supported by substantial evidence, that Anastasio was acting as the petitioner's agent when he accepted illegal payments from Seregos. The court below characterized the agreement between Seregos and Anastasio as having four interlocking facets, to wit: (1) The Company would voluntarily recognize the Union; (2) the Company would check-off union dues and initiation fees and fund a variety of fringe benefits; (3) the Union would steer business to the Company; and (4) Anastasio would be paid a commission for the business referred to Jackson. App. A, *infra*, 22a-23a. Yet, no substantial evidence was adduced that Anastasio *intended* to serve the interests of the petitioner.[3]

The ALJ found that: (1) the record was devoid of any evidence that Anastasio was authorized by the petitioner to obtain additional business for employers and to enter into arrangements for payment from the employer for such referrals; (2) there is no evidence that the petitioner received any of the monies paid by Jackson through Seregos to Anastasio; and (3) there was no evidence that the petitioner received any other tangible benefits from such payments. App. C, *infra*, 85a. The Board disregarded, but did not dispute those findings. As the dissent below accurately observed:

> "The solicitation and acceptance of kickback payments here appear in no way to have been motivated by the officials' desire to serve their union. Instead it appears from the evidence that Scotto and Anastasio simply exploited their powerful positions as ILA officials." App. A, *infra*, 45a.

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[3] Conceptually, the kickback arrangement consisted of two parts: (1) Scotto and Anastasio referred business to Jackson and (2) Seregos made cash payments to Anastasio, which Anastasio accepted for himself. Under Section 8(a)(1)-(2) and Section 8(b)(1)(A) of the Act, there is nothing unlawful about union leaders referring work to a signatory employer. The court below found that

Perhaps, recognizing the gossamer texture of its application of ordinary agency principles to this case, the court below found refuge in the Board's determination that the collective bargaining relationship between the petitioner and Jackson was "tainted" *ab initio*[4] (App. A, *infra*, 21a) and that the temporal confluence of Anastasio's acceptance of some employer payments while the parties were negotiating the modification of an existing collective bargaining agreement to accommodate a new shipyard operation further supported an inference of "taint".

Acceptance of the decision of the Board and the court below would ,therefore, decree in similar cases a greater emphasis on the *application* of the ordinary principles of agency law rather than the principles themselves. Such a result can only penalize the union victim rather than the officer wrongdoer.

2. In affirming the decision and order of the Board, the court below held that a labor organization may be found to have violated Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), solely on the basis of the concealed criminal acts of an officer

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(cont.)
the petitioner "benefitted" from the arrangement through: (1) Jackson's recognition of the union; (2) the concommitant extension of the petitioner's representation of ship repair workers; and (3) the extension of its strength and authority on the waterfront. App. A, *infra*, 21a-22a. But assuming *arguendo*, that such benefits accrued to the petitioner, they did not result from Anastasio's acceptance of payments from Seregos. Both benefits resulted from referrals of business to Jackson, the *lawful part of the arrangement.*

[4] The court below described the Anastasio-Seregos arrangement as involving the referral of business as a *quid pro quo* for Jackson's recognition of the petitioner. App. A, *infra*, 21a. If the Board had considered Jackson's recognition of the petitioner as such a *quid pro quo*, presumably, it would have considered all of Jackson's collective bargaining agreements with the petitioner to have been tainted and would have required the petitioner and Jackson to reimburse all of Jackson's employees for dues, intitiation fees and other membership obligations paid since 1975. However, the Board carefully restricted its reimbursement remedy to those members who joined the union after September 5, 1979. App. D, *infra*, 118a. Thus, in the Board's judgment, Jackson's recognition of the petitioner was *not* an element of the kickback arrangement.

in accepting illegal employer payments *despite uncontradicted findings that at all times the labor organization vigorously and effectively represented an uncoerced majority of the employer's employees*. As the dissent below accurately observed, this case apparently represents the first time that the Board has applied the Section 8(a)(2) proscription of financial and other support of unions by employers to a scheme of individual corruption involving kickback payments that in no way benefitted the union as an entity. App. A, *infra*, 43a. Taken to its logical extremity, the decision below grants the Board extraordinary power to abrogate under Section 8(a)(1) and Section 8(b)(1)(A) virtually any collective bargaining agreement or relationship temporally coincident with corrupt dealings between a representative of the employer and an officer of the union, despite uncontradicted findings that the agreement or relationship was unaffected by such criminal acts.

Section 7 of the Act guarantees employees the right to collectively bargain through representatives of their own choosing. 29 U.S.C. 157. Section 8(b)(1)(A) makes it an unfair labor practice "... to restrain or coerce (A) employees in the exercise of ..." their Section 7 rights. The ALJ found that the petitioner at all times represented an uncoerced majority of Jackson's employees. App. C, *infra*, 79a, 102a, 105a. The Board adopted those findings but subsumed them in an overriding and unsupported inference of "taint". App. D, *infra*, 112a, 114a. In the absence of demonstrable coercion, a necessary element of a Section 8(b)(1)(A) violation, the court below adopted the Board's inference of "taint" of the collective bargaining relationship based upon the concurrent, though without evidentiary basis, facts of the illegal payments and negotiation for modification.[5] App.

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[5] Since the Board's decision and order rest upon its factual conclusion that the kickback arrangement "tainted" the parties relationship and the modified collective bargaining agreement, the substantial evidence rule requires enforcement of the Board's order only if supported by "... substantial evidence on the record considered as a whole." 29 U.S.C. 160(f); *Allen v. NLRB*, 561 F.2d 976, 978 (D.C. Cir. 1977). Although "the 'substantial' evidence standard is not modified in any way when the Board and its examiner disagree

A, *infra*, 33a. That inference is wholly inconsistent with the uncontradicted fact that: (1) the petitioner at all times represented an uncoerced majority of Jackson's employees; (2) the petitioner vigorously and effectively represented Jackson's employees in collective bargaining; (3) negotiations for the modification were conducted without the participation of the individuals involved in the kickback scheme; (4) the negotiations for modification were conducted with the participation of and ratified by the employees of Jackson; and (5) the collective bargaining agreement, as modified, contained greater benefits than those found in comparable shipyard industry agreements, as well as the agreement between the charging party at the Board and the previous owner of the shipyard. App. C, *infra*, 105a-106a.

The dissent below flawlessly described the legal and logical vagaries of the Board's approach to the Section 8(b)(1)(A) violation herein as follows:

> "If the Board's decision in this case is based on its conclusion that concealed kickback payments of this kind to high union officers are *inherently* coercive and *necessarily* taint the bargaining relationship, then the Board has introduced a major innovation in the law of labor relations permitting massive government intervention into collective bargaining relationships in the absence of any *evidence* of coercion or lack of majority status." App. A, *infra*, 46a-47a.

If the decision below is permitted to stand, it will stand for the proposition that employees forfeit their Section 7 rights to engage in collective bargaining through representatives of their own choosing solely because an officer of their union has accepted payments in violation of 29 U.S.C. 186(b).

(cont.)

... the evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

3. The court below decided, *inter alia*, that the petitioner should be held responsible for the concealed criminal acts of two of its highest officers, not only on the grounds that the illegal payments were exacted in the scope of the officers' employment and that the petitioner benefitted from the kickback arrangement, but also on the ground that the petitioner condoned and acquiesced in those criminal acts by allowing the officers to retain their positions for more than two years after their indictment.[6] App. A, *infra*, 8a. It would appear that the elasticity of the logic of the decision below on the agency question was prompted, in part, by the court's misperception of the record and, more significantly, its failure to consider the petitioner's actions in the context of the national labor policy ennunciated in Section 504 of the Labor Management and Disclosure Act of 1959, 29 U.S.C. 504.

Section 504 provides that no person may hold union office after conviction of enumerated crimes. An officer is under the disability of "conviction" *only* " ... from the date of judgment of the trial court or the date of the final sustaining of such judgment on appeal, *whichever is the later event*." 29 U.S.C. 504(c) (emphasis added).

Two of the petitioner's officers were indicted in January, 1979 for violations of 18 U.S.C. 1962 predicated on violations of 29 U.S.C. 186(b). None of the charges were factually related to Jackson with whom the petitioner, through a predecessor local

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[6] That conclusion by the court below was obviously based upon erroneous perceptions of the facts surrounding Scotto and Anastasio's retention in office. First, the two union officers were never, as suggested by the Court of Appeals (App. A, *infra*, 9a) ordered or sentenced by the trial judge in the RICO prosecution to forfeit their union office. *See United States v. Scotto*, *supra*, 641 F.2d at 50, n.1. Second, Scotto and Anastasio were not "replaced by elections" until almost two years after the superceding indictment (App. A, *infra*, 8a), but rather resigned their union offices in November, 1980 as a result of their unsuccessful state court actions involving the application of the Waterfront Commission Act, N.Y. McK. Unconsol. Laws, Section 9933; *See Scotto v. Waterfront Commission*, No. 5580 81 (N.Y. Sup. Ct. Sept. 19, 1980), *aff'd*, 78 A.D. 2d 1980, 686 (2d Dept. 1980), *leave to appeal denied*, 51 N.Y. 2d 709 (1980).

Scotto and Anastasio's petition for a writ of certiorari to this Court was not denied until June 22, 1981.

union, had maintained a collective bargaining relationship since 1975. In June 1979, the petitioner commenced negotiations with Jackson for modification of an existing collective bargaining agreement to accommodate a substantially new and different ship repair operation which would create additional and more regularized employment for the petitioner's members. App. C, *infra*, 106a. In July 1979, a superceding indictment was filed charging Anastasio with accepting illegal employer payments from Jackson between 1978 and early July 1979 in violation of 29 U.S.C. 186(b) and 18 U.S.C. 1962. The court below found that at that point a "truly upright" union would have taken "some disciplinary action" against the *accused* union officers.[7] App. A, *infra*, 23a.

The petitioner, mindful of the potential for real and/or apparent conflict in the negotiations for modification of the collective bargaining agreement, removed the accused officers from participation in those negotiations. App. C, *infra*, 106a. Any action by the petitioner in July or September, 1979 to remove or suspend the accused officers would only have been predicated upon the accusations of a federal grand jury. To adopt the reasoning of the court below *vis a vis* the petitioner's failure to take precipitous disciplinary action would be to postulate that, notwithstanding 29 U.S.C. 504(a)(c), a labor organization must, *upon the indictment* of its officers for violations of 29 U.S.C. 186(b), undertake to discipline the accused officers *or* risk a finding of acquiescence, condonation, ratification and, by extension, agency. We know of no decision or statutory authority for imposing such a requirement upon a labor organization.

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[7] By suggesting that the petitioner was obligated to commence some form of disciplinary action against Scotto and Anastasio after their indictment, the court below ignores the federal labor policy against unnecessary governmental intervention in internal union affairs. *Wirtz v. Local 153, Glass Bottle Blowers*, 389 U.S. 463 (1968). Moreover, while 29 U.S.C. 529 prohibits a union from imposing discipline on its members for certain protected activity, it does not purport to delineate the circumstances in which the union is required to impose discipline. *See also, United States v. Jalas*, 409 F.2d 358 (7th Cir. 1969).

It is submitted that the court below erred in finding the petitioner responsible for the concealed criminal acts of certain of its officers by reason of petitioner's failure to take disciplinary action against them after indictment and prior to the final sustaining of a judgment of conviction on appeal.

4. By affirming the Board's remedial order, the court below has approved an unprecedented extension of the Board's jurisdiction to the remediation of labor union corruption and, concommitantly, grants the Board authority to remedy such corruption by the punitive and atypical application of traditional unfair labor practice remedies.

The Board is empowered "... to prevent any person from engaging in an unfair labor practice ...", 29 U.S.C. 160(a) and shall "... take such action ... as will effectuate the policies of [the Act] ...". 29 U.S.C. 160(c). Although the Board has considerable discretion in fashioning a remedy for unfair labor practices, the Board's power is "remedial, not punitive." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938). *Accord, Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961). The Board's remedial power is limited to restraining violations of the Act and "removing or avoiding the consequences of violation when those consequences are of a kind to thwart the purposes of the Act". *Local 60, Carpenters, supra*, 365 U.S. at 655, quoting *Consolidated Edison Co., supra*, 305 U.S. at 236.

In this case, the Board adopted the ALJ's recommended order that the petitioner cease and desist from accepting payments from Jackson for the referral of business to Jackson or, from otherwise accepting financial or other support and assistance from Jackson and that the petitioner post a notice to that effect. The Board also ordered extraordinary relief that the ALJ had rejected. The Board ordered the petitioner: (1) to cease acting or purporting to act as the exclusive collective bargaining representative of Jackson's employees;[5] (2) to cease performing

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[5] The Board has consistently approved of an employer's voluntary recognition of a labor organization as the exclusive collective bargaining representative, provided the labor organization represents an uncoerced majority of

or giving effect to the collective bargaining agreement, as modified in 1979;[9] and (3) together with Jackson,[10] to reimburse Jackson's present and former employees for dues, initiation fees and other membership obligations paid pursuant to the 1979 modified collective bargaining agreement.[11]

(cont.)
the employer's employees in an appropriate bargaining unit . *See NLRB v. Gissel Packing Company*, 395 U.S. 575, 595-600 (1969). Correlatively, the Board may order withdrawal of such recognition where a labor organization does not represent an uncoerced majority of unit employees. *See, e.g. IL-GWU v. NLRB*, 366 U.S. 731 (1961); *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261 (1938). However, when the Board strips a labor organization of its status of collective bargaining representative based on a Section 8(a)(2) or 8(b)(1)(A) violation, it penalizes the labor organization and violates the employees' Section 7 rights if the labor organization represents an uncoerced majority of unit employees. Ironically, the only authority cited in the decision below for the premise that an employer's bribery of a high union officer constitutes an unfair labor practice also decries the disestablishment of a union because it penalizes the employees by destroying their union and, thereby, constitutes a "perversion and frustration" of the purposes for which the Act was created. *See, NLRB v. Hollywood-Maxwell Co.*, 126 F.2d 815 at 824 (9th Cir. 1942).

[9] Since "the Act gives no express authority to the Board to invalidate contracts," *Consolidated Edison Co. v. NLRB, supra*, 305 U.S. at 235, such sanctions may be permissible, but only if the agreement itself is unlawful or if there is some causal connection between the contract being invalidated and the unfair labor practice found by the Board. *See also, NLRB v. Vernitron Electrical Components, Inc.*, 548 F.2d 24, 27 (1st Cir. 1977); *NLRB v. Mark J. Gerry, Inc.*, 355 F.2d 727, 730-731 (9th Cir. 1966), *cert denied*, 385 U.S. 820 (1966); *NLRB v. U.S. Steel Corp.*, 278 F.2d 896 (3rd Cir. 1960), *cert denied*, 366 U.S. 908 (1961); *Morrison-Knudsen Co. v. NLRB*, 276 F.2d 63, 76 (9th Cir. 1960), quoted with approval in *Local 60, Carpenters v. NLRB, supra*, 365 U.S. at 655-656.

[10] Joint liability with Jackson for reimbursement of dues is illusory. On February 18, 1983, an involuntary petition was filed against Jackson under Chapter 11 of the Bankruptcy Code (Bankruptcy No. 183-30347-21) in the United States Bankruptcy Court for the Eastern District of New York. That proceeding is pending.

[11] Absent the factual finding that employees were directly coerced into paying dues and initiation fees, the Board-ordered direct reimbursement of such payments is punitive and contrary to the purposes of the Act, even if such

The Court of Appeals' approval of the Board's remedial order appears, again, to be solely predicated upon its conclusion that "this is a truly stark case of corruption in labor management relations." App. A, *infra*, 2a. It held that the remedies ordered by the Board bear a "reasonable relation" to the violations found (App. A, *infra*, 4a), irrespective of their unprecedented and novel application to the Section 8(a)(1), 8(a)(2) and 8(b)(1)(A) violations which were the subject of the Board proceedings. The underlying premises of the Court of Appeals' characterization of the relationship between the violations and the Board ordered remedies is its conclusion that: "Like its highest officers themselves, the Union's representation of Jackson employees had been thoroughly corrupted." App. A, *infra*, 38a. That premise and conclusion is unsupported by the Record.

Stripped of its logomachistic veneer, the decision of the court below and its approval of the remedy fashioned by the Board is based, not upon the Board's administrative competence, remedial discretion or specialized expertise, but rather its implicit approval of the Board's desire to broaden its statutory mandate to include the rooting out of labor union corruption.

(cont.)
payments are required by the unlawful union security clause or other provisions of an unlawful collective bargaining agreement. *See e.g., Local 60, Carpenters, supra; Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36, 40-43 (9th Cir. 1969); *NLRB v. Burke Oldsmobile Inc.*, 285 F.2d 14, 16-17 (2nd Cir. 1961). This Court observed in *Local 60, Carpenters, supra*, 365 U.S. at 655-656:

> "Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members; and no 'dissipation' of the effects of the prohibited action is achieved. The order in those circumstances becomes punitive and beyond the power of the Board. As Judge Pope said in *Morrison-Knudsen Co. v. National Labor Relations Board*, 9 Cir., 276 F.2d 63, 76, 'reimbursing a lot of old-time union men' by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained, or retained in violation of the Act."

The Board's charter was not intended to include the imposition of sanctions upon labor organizations whose highest officers have accepted employer payments in violation of 29 U.S.C. 186(b). The Board has no special expertise in discovering or remediating this type of corruption. By enacting 29 U.S.C. 186, the Congress delegated those functions to other branches of the executive and the judiciary.

The majority in the court below, responding to the dissent's characterization of its decision as an impermissible extension of the Board's powers to intervene and dissolve collective bargaining relationships engendered by corruption, seeks to limit its approval of the Board's remediation efforts to the facts of this case. App. A, *infra*, 41a-42a, n.29. In fact, however, violations of 29 U.S.C. 186 are neither novel nor unprecedented. What is novel and unprecedented is the imposition of a remedy which:

> "...penalize[s] not the culprits but the Union and its members who are, as far as we can tell from the record, only innocent bystanders to the wrongdoing." App. A, *infra*, 47a.

The punitive and inappropriate character of the Board's order is especially evident upon consideration of the impact of its enforcement upon the petitioner. The petitioner, and its predecessor local union, vigorously represented Jackson's employees since 1975 – but will find its recognition withdrawn. The petitioner negotiated the modification of an agreement which resulted in regularization of employment for Jackson's employees and the creation of hundreds of new jobs – but will find its collective bargaining agreement abrogated. The petitioner expended its treasury monies, manpower and expertise in negotiating terms and conditions of employment in excess of comparable shipyard agreements – but will be required to severally reimburse hundreds of thousands of dollars in dues and initiation fees to Jackson employees, who freely chose the petitioner as their collective bargaining representative.

The court below suggests that the Board's remedial efforts be "viewed pragmatically". App. A, *infra*, 27a. Viewed

pragmatically, the Board's wholly inappropriate application of its arsenal of remedies to the facts of this case does not effectuate the policies of the Act and is, therefore, punitive and unlawful. *See Local 60, Carpenters v. NLRB, supra; Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943); *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *NLRB v. District 50, UMW*, 355 U.S. 453 (1958).

If the decision below is permitted to stand, it will constitute an impermissible and unjustified extension of the Board's jurisdiction to the remediation of labor union corruption.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1113

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 83-1117

JACKSON ENGINEERING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board and Cross-Application for Enforcement

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Argued November 10, 1983

Decided May 15, 1984

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James M. Altman, with whom *David Jaffe* was on the brief, for petitioner in No. 83-1113. *Howard Schulman* also entered an appearance for petitioner.

Andrew E. Zelman, with whom *Ellen R. Mandelbaum* was on the brief, for petitioner in No. 83-1117.

Allison W. Brown, Jr., Attorney, National Labor Relations Board, with whom *Elliott Moore*, Deputy Associate General Counsel, was on the brief, for respondent in Nos. 83-1113 and 83-1117.

Before: WILKEY and WALD, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

Dissenting opinion filed by *Circuit Judge* WALD.

MACKINNON, *Senior Circuit Judge*: This is a truly stark case of corruption in labor-mangement relations. Presented to this Court are legal questions of considerable importance and some novelty: the responsibility of a union that obtains a union shop agreement from an employer as part of a corrupt agreement to pay the union's highest officers to steer work to the employer from other businesses, and the authority of the National Labor Relations Board ("NLRB") to remedy the effects of such unlawful concealed assistance. Both Jackson Engineering Co., Inc. ("Jackson," or the "Company," or the "Employer"), and Local 1814 of the International Longshoremen's Association, AFL-CIO ("Local 1814" or the "Union") petition to reverse the Board's decision.

In 1975, the president of Jackson struck a deal with the two highest officials of the Union: the Company would welcome the Union's representation of Jackson's employees if the Union would steer business to the Employer. *In addition to extending their Union's representation and authority, the Union officials were to receive a ten percent cash kickback for the business that Local 1814 referred to Jackson.* As all parties are agreed, the

execution of this agreement over the next few years was a blatant violation of the anti-bribery provision of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 186 (1976).

Petitioners seek review of the NLRB's order holding that the kickback arrangement, involving as it did the contribution of support by the Employer to the Union, constituted unfair labor practices on the part of both the Employer and the Union.[1] The Board ordered petitioners to cease and desist from such actions, and further ordered Jackson to withdraw its voluntary recognition of Local 1814 as the exclusive collective bargaining representative of Jackson's employees until the Union was certified by the Board, that the current collective bargaining agreement be abrogated, and that Jackson and Local 1814 jointly reimburse Jackson's employees for all union dues and related membership fees paid under the union security clause in the 1979 collective bargaining agreement.

Petitioners' first objection to the Board's decision is that the illegal acts of the Union's officers are not attributable to the Union itself, and thus that neither the Union nor the Employer Jackson committed an unfair labor practice. We disagree. Local 1814 was properly held responsible for these acts of its highest officers—actions closely related to the conduct of the Union's business, which would foreseeably yield benefits to the Union itself, and which did in fact yield such benefits.

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[1] Jackson was held to have violated both sections 8(a)(1) & (2) of the Act, which prohibit employer assistance of labor organizations through the contribution of financial or other support; Local 1814 was found in violation of section 8(b)(1)(A) of the Act, which prohibits unions from restraining or coercing employees in the exercise of their statutory rights to bargain collectively through representatives of their own choosing. The full text of these statutory provisions appears *supra* note 12.

Petitioners further contend that the Board lacked authority to take affirmative remedial steps against the Union and the Employer because the Union local always represented an uncoerced majority of the Jackson employees. As far as this Court is aware, the NLRB has never before applied such affirmative remedies to a case of concealed unlawful assistance by an employer to a union. In that sense, this is a case of first impression. This Court recognizes, however, that the fashioning of remedies in the field of labor relations frequently calls for flexible application of familiar statutory policies to novel factual situations, and that the Board possesses broad discretion in the matching of remedies to wrongs. Cognizant of such administrative discretion, and attentive to the central policy of the NLRA—to allow workers free exercise of their rights to bargain collectively—we rule that the remedies ordered by the Board bear a reasonable relation to the violations found. Where corruption is endemic to the relations between an employer and union, the Board is justified in requiring a fresh start under which employees may freely designate a collective bargaining representative of their choice.

I. Factual Background

The facts of this case indicate the existence of a deliberate, flagrant, and very substantial kickback scheme between Jackson and Local 1814. Those facts are extensive but deserve detailed attention: they provide the basis both for holding the Union responsible for the conduct of its officers, and for the authority of the Board to order the remedies that it did.

A. *The Origin of the Kickback Arrangement*

Jackson is a New Jersey corporation performing ship building, maintenance, and repair at sites in New Jersey and New York. Jackson began operations in 1948, and until 1975, its employees were not represented by any

labor organization. Some time in 1975, Nicholas Seregos, who was at all relevant times the principal owner and president of Jackson, came to the conclusion that his Company's efforts to get business had been hampered by the fact that its work force was not unionized. In particular, Seregos had observed over time that United States flag ships would repeatedly reject his solicitations on the grounds that Jackson was not a union shop. Sonny Montella, an acquaintance of Seregos, suggested to him that he contact Anthony Anastasio, the Secretary-Treasurer and later Executive Vice President of the predecessor of Local 1814 of the International Longshoremen's Association, AFL-CIO ("ILA").[2]

Seregos contacted Anastasio at the Union's office and expressed his interest in both obtaining some business for Jackson and unionizing his shop. Anastasio then met with the employees to see if they would be willing to sign up with the Union; the record is silent as to the events of this meeting.

Seregos and Anastasio met again sometime shortly before July 11, 1975. Anastasio offered to get Jackson some business in exchange for a kickback of ten percent of the proceeds; Anastasio made it clear to Seregos that he would refer business to Jackson *only* on the condition that the firm unionized. Seregos agreed to both the kickback arrangement and to unionization of Jackson's workforce.

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[2] At the time, Anastasio was Secretary-Treasurer of Local 1277, ILA. In March, 1978, Local 1277 and other locals of the ILA merged into Local 1814. All parties agree that Local 1814 is the successor to Local 1277. References to the ILA local will be to "Local 1814." As Secretary-Treasurer, Anastasio was responsible for the administration of contracts for Local 1814 in the ship repair industry. He continued exercising that responsibility after the merger, when he became Executive Vice President, the second highest position in the merged organization.

Seregos and Anastasio next met in the Local 1814 office around July 11, 1975. Anastasio told Seregos that he could help get Jackson business from Prudential Lines, a United States flag line, and instructed Seregos to write to a particular officer at Prudential. Seregos' letter to Prudential, dated July 11, 1975, falsely stressed that his firm was a union shop affiliated with Local 1814. Not until September 15, 1975, did Local 1814 actually obtain authorization cards from Jackson's employees. In late September, Seregos, for Jackson, signed a memorandum of understanding with Local 1814, agreeing to recognize the Union. The Company began to check off employees' union dues and forward the funds to the Union.

Next, sometime in the fall of 1975, Seregos and Anastasio met with Anthony Scotto, president of Local 1814, at the Union's office. Seregos asked for more work referrals; Anastasio indicated that he could help Jackson get work with United States Shipping Lines. Anastasio then asked how Seregos was going to pay the ten percent kickback on the business. Scotto offered to help Seregos set up a foreign corporation to smooth the arrangement, but Seregos declined the offer. Seregos, Scotto, and Anastasio then signed a collective bargaining agreement—a multi-employer contract covering eleven other employers in the industry—binding Jackson for a period of three years from November 3, 1975.

Soon after this meeting, Jackson got work from two shipping lines. Jackson started to receive business from Prudential in September, 1975. In late 1975, after Jackson had begun receiving business from Prudential and United States Shipping Lines, Seregos and Anastasio further discussed the method of payment for the kickbacks, and agreed that Seregos would pay Anastasio in cash.

In early 1976, the ten percent payments began; they were made in cash at the Local 1814 office with only

Seregos and Anastasio present. For the business referred to Jackson from the two shipping lines for 1976, Seregos paid Anastasio $15,000. The total for 1977 was $16,000.[3] During 1978, the payments totalled $28,700.[4] Throughout this period, Seregos and Anastasio were responsible for administering the collective bargaining agreement between Jackson and Local 1814. Between 1975 and 1979, both Jackson's business and its number of employees—all Local 1814 members—grew considerably. On November 3, 1978, Jackson and Local 1814 agreed to a modified three-year renewal of their collective bargaining agreement; Seregos signed for Jackson, and Anastasio and Joseph Collazzo signed for the Union.

B. *The Criminal Indictments and Final Kickback Payments*

In January, 1979, the Grand Jury in the Southern District of New York handed down an indictment against Scotto and Anastasio concerning their acceptance of payments from other employers under contract to Local 1814. Jackson was not included as a defendant in that indictment. In early May, 1979, at the Local 1814 office, Anastasio asked Seregos if there was any money due "against the work." When Seregos balked due to the pending criminal investigation, Anastasio reassured him. Seregos paid Anastasio $4000 on May 8, 1979.

Sometime later, Anastasio asked Seregos to contribute to the cost of Scotto's defense against the indictment. When Seregos hesitated, Anastasio asked him to try to help out, and told him that Anastasio and Scotto were

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[3] During 1977, Seregos gave Anastasio $5000 on June 2, $1000 on October 6, $5000 on November 17, and $5000 on December 19.

[4] The 1978 figures and dates were as follows: $5000 on February 28, $5000 on March 23, $5000 on April 10, $5000 on May 15, $3700 on July 3, and $5000 on November 15. These payments were for the business of United States Shipping Lines; Jackson lost Prudential's business in 1978.

having a reception at a hotel and asking others in the industry to contribute to pay Scotto's attorneys' fees. Seregos then paid Anastasio $4000 cash at the Local 1814 office, on July 5, 1979. On July 31, 1979, a superseding indictment was issued, charging Scotto and Anastasio with additional corrupt conduct. In part, the added counts involved the payments from Seregos to Anastasio from 1977-79.[5]

After the superseding indictment was filed, Local 1814 removed Anastasio from dealings and negotiations with Jackson, and Jackson removed Seregos from dealings with the Union. Both Anastasio and Scotto, however, were allowed to retain their offices in the Union, and the two were not replaced by elections until almost two years later.

Scotto and Anastasio were tried in the Southern District of New York on multiple criminal counts of receiving unlawful labor payments under section 302 of the Taft-Hartley Act, 29 U.S.C. § 186(b);[6] racketeering and

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[5] Scotto was not indicted for dealings with Seregos or Jackson.

[6] 29 U.S.C. § 186(a) & (b) (1976) provides:

> (a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees . . . or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . or . . .
>
> (4) to any officer or employee of a labor organization . . . with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

conspiracy charges under 18 U.S.C. § 1962(c) and (d); and tax evasion charges under 26 U.S.C. §§ 7201 & 7206(1). In January of 1980, the jury convicted both defendants. Anastasio was convicted on the Jackson payments, and was sentenced to two years in prison, five years probation, and a $5000 fine. Scotto, who was not indicted on the Jackson payments, was sentenced on other counts to five years in prison, five years probation, and $75,000 in fines. The trial judge also ordered that the two defendants forfeit their offices in the Union. On September 2, 1980, the Second Circuit unanimously affirmed the convictions. *See United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). All the time that the federal appeal and defendants' unsuccessful state court actions to retain their offices were pending, Local 1814 allowed Scotto and Anastasio to remain in their respective positions at the head of the Union. The two were not replaced until May, 1981, when new elections were held.

C. *Renegotiation of the Collective Bargaining Agreement*

Sometime in late 1978, Jackson began negotiating with Brewer Drydock Co. ("Brewer") for the purchase of a drydock facility on Staten Island. Jackson's business had, up to then, been purely a pierside operation; the drydock operation would be complementary, and was located opposite Jackson's facility in Brooklyn. In early June, 1979, Jackson agreed to purchase Brewer's Staten Island facility, and to take it over on June 15. Brewer's Staten Island employees had been represented by Local 17, Industrial Union of Marine and Shipbuilding Workers of America ("Local 17").[7] When Jackson took over the

[7] The last collective bargaining agreement between Brewer and Local 17 was to run until August 31, 1981, and contained a clause binding Brewer and its "successors and assigns." All of Brewer's employees, however, had been laid off prior to the June, 1979, sale. During the summer of 1979, officials of Local 17 asserted, without success, that Jackson was bound

Staten Island facility, the Company recognized Local 1814 as the representative of its employees there, believing it was obligated to do so.

In late June or early July, 1979, Jackson initiated negotiations with Local 1814 to *modify* their existing collective bargaining agreement. Jackson sought *reduction* in wages and benefits, claiming that the firm's new ability to handle combination pierside-drydock work would result in more regular work for employees. The Company also asserted that shipyard work brought lower market prices, and that labor costs of shipyard operations were usually lower. After extensive negotiation, involving a number of bargaining sessions, the parties reached a modified collective bargaining agreement on September 15, 1979. The agreement extended the recognition clause to cover the new Staten Island facility, but the Union agreed to *reduced wages and reductions in certain benefits* for most Jackson employees.[8] The record contains no suggestion as to what, if anything, the Employer gave up in exchange for receiving these concessions from the Union. Scotto and Anastasio did not personally take part in these negotiations, but they remained the highest officials of the Union throughout.

II. Procedural Development

A. *Initiation of the Complaint*

On September 28, 1979, Local 17 filed unfair labor practice charges against Jackson and Local 1814 with

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by the successor clause to recognize Local 17 as the representative of employees at the Staten Island facility. Local 17 did not claim, however, that it represented any of Jackson's employees.

[8] The twenty-five most senior Jackson employees received no reduction in wages or benefits. For the remainder of the workforce, wages and pension and hospitalization benefits were slightly reduced. Holidays, sick days, and jury days were unchanged.

the National Labor Relations Board. As initially filed, the Local 17 complaint was considerably broader than the complaint ultimately brought before Administrative Law Judge (ALJ) Fish.[9] As presented to the ALJ by the General Counsel, the case primarily involved the illegality, under sections 8(a)(1) and (2) and section 8(b)(1)(A) of the NLRA, of the concealed payments from Seregos to Anastasio. In addition, the complaint presented *Midwest Piping* [10] allegations that Jackson had committed an unfair labor practice against Local 17 by recognizing Local 1814 as the bargaining representative of Jackson's Staten Island employees while a real question of representation existed. These aspects of the complaint were distinct, yet factually related.

B. *The Decision of the Administrative Law Judge*

Upon the foregoing facts, the ALJ found both Jackson and Local 1814 guilty of unfair labor practices based on the concealed payments. The judge found that the undisputed evidence indicated that Seregos had made illegal concealed payments to Anastasio, and that Scotto

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[9] The allegations of the complaint that dropped out of the case before the decision of the ALJ were the Local 17 charge that Jackson violated section 8(a)(5) of the Act by refusing to recognize that union as the successor to Brewer's bargaining obligation; that Jackson violated section 8(a)(3) by discriminatorily refusing to hire former Brewer employees because of their Local 17 membership; and that Local 1814 violated sections 8(b)(1)(A) and (2) by inducing Jackson to refuse to hire those employees. The Regional Director of the NLRB refused to issue a complaint with respect to these charges, and specifically dismissed the section 8(a)(5) charges.

[10] Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945), in which the Board held violative of section 8(a)(2) an employer's recognition of one union as the bargaining representative of employees while a real question of representation existed between two rival unions.

had at least condoned this arrangement. *Jackson Engineering Co.*, Nos. 29-CA-7498, 29-CB-3966 (May 27, 1982) (hereinafter "ALJ Decision") at 24, 28 (JA 292, 315, 319). In addition, the ALJ explicitly found that the evidence before him yielded the conclusion that the kickback arrangement had been agreed to *before* the execution of the original memorandum and contract between Jackson and Local 1814. *Id.* at 8-9 (JA 299-300). Based on those facts, the ALJ stated the central question to be:

> whether the payments were made to a "labor organization", or put another way, whether Anastasio and Scotto were agents of [Local 1814] with respect to this conduct.

Id. at 25 (JA 316). To find the answer to this question, the ALJ turned to section 2(13) of the Act, *see infra*, which he interpreted in turn to refer him to general principles of agency law. *Id.* at 26 & n.44 (JA 317).

The ALJ found that the concealed payments were related to Anastasio's exercise of his authority to act for the Union, because they were "intimately connected" with the Company's decision to recognize the Union. *Id.* at 27 & n.44 (JA 318). *Furthermore, the ALJ specifically found that the kickback arrangement had been "supportive of the interests of the Union," in generating more work for members of Local 1814, and more funds for the Union itself. Id.* at 28 (JA 319) (emphasis added). The ALJ reasoned that the entire arrangement had been engineered by the Union's highest officials, and in the absence of outright authorization by the Union's membership, which could hardly be expected to be demonstrable concerning illegal concealed acts, no greater degree of responsibility by the Union could possibly be proven. *Id.* at 28-29 (JA 319-20). All these facts led to the inexorable conclusion that the Employer had provided the Union with illegal assistance in violation of section

8(a)(1) and (2) of the Act, and that the Union had violated section 8(b)(1)(A) of the Act.[11]

The remedies ordered by the ALJ were limited to cease-and-desist orders to both the Company and the Union concerning illegal payments, and requirements of posting of notices. ALJ Decision at 44-46 (JA 335-37). The ALJ particularly declined to set aside the parties' bargaining relationship on the basis of the unlawful payments. *Id.* at 43 (JA 334).

C. *The Decision of the Board*

The Employer, the Union, and the General Counsel each filed exceptions to the decision of the ALJ. Adopting the underlying facts found by the ALJ, the Board affirmed his decision concerning the unfair labor practices of Jackson and Local 1814 respectively. Thus the Board approved the ALJ's findings that Anastasio and Scotto had acted on behalf of the Union, and that the illicit arrangement had served the Union's interests. The Board disagreed unanimously, however, with the ALJ's conclusion that the concealed payments arrangements did not warrant setting aside the parties' contract of September 15, 1979. Central to the Board's decision were the following findings:

> [A]t or about the same time [Local 1814 and Jackson] were negotiating midterm contract modifications granting [the Employer] economic concessions, concealed payments involving large sums of

[11] The ALJ went on to decide that the Company had not committed *Midwest Piping* violations by recognizing Local 1814 as the bargaining representative of the employees at Jackson's Staten Island facility. ALJ Decision at 30, 43 (JA 321, 334). In so doing, the ALJ relied on findings that Local 1814 had enjoyed majority status among Jackson's employees, *id.* at 40 (JA 331), and that the Union had provided those employees with "vigorous and effective representation" throughout the period of concealed payments. *Id.* at 42 (JA 333).

> money were changing hands. *We find that these concurrent actions operated to taint and undermine the bargaining relationship between [the parties] and the contract which was negotiated by them while the payments were being made.* Our conclusion in this regard is not affected by the fact that Anastasio, Scotto, and Seregos personally did not engage in the negotiations which led to the modified contract. Although those individuals may not personally have participated, they were, at all material times, [Local 1814's] executive vice president and president and [Jackson's] president, respectively. Under these circumstances, we do not regard their divorce from the actual negotiations to be determinative of this issue.

Jackson Engineering Co., Nos. 29-CA-7498, 29-CB-3966, 265 NLRB No. 175, slip op. at 5 (Dec. 28, 1982) (hereinafter "Board Decision") (JA 396, 400) (emphasis added).

On this basis, the Board modified the ALJ's remedial order. *Id.* at 7-12 (JA 402-07). Beyond the original cease-and-desist orders, the Board added remedial provisions ordering Jackson to cease recognition of Local 1814 until the Union was certified by the NLRB, and to cease giving effect to the September, 1979, collective bargaining agreement. Corresponding orders were directed at the Union. Finally, the Employer and Union were ordered jointly and severally to reimburse all of the Jackson employees who joined the Union *after the September 19, 1979, collective bargaining agreement became effective*, for the total dues and fees paid by those employees during that period. These petitions for review followed.

III. Unlawful Assistance: The Union's Responsibility Under Agency Principles

This case is somewhat novel in that, as was conceded at oral argument, the National Labor Relations Board has seldom if ever sought to use the unfair labor practice

provisions of the NLRA to remedy corrupt criminal payments of an employer to a union. Yet the issues in this case all revolve around one central question that is neither unfamiliar nor particularly troublesome: Can the Union fairly be held responsible for the unlawful acts of its highest officers when those acts go to the very heart of the contractual relationship between the Employer and Union?

Petitioners' first challenge is directed at the Board's substantive conclusion that the Employer and the Union each committed unfair labor practices, having respectively violated sections 8(a)(1) & (2) and section 8(b)(1)(A) of the NLRA.[12] The premise of this attack is that unless the acceptance of the unlawful payments by Scotto and Anastasio can be attributed to the Union, then neither the Employer nor the Union can be charged with an unfair labor practice. By the same token, petitioners concede that if made to the Union, the concealed payments would constitute the contribution of support and would therefore give rise to violations on the part

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[12] The portions of the NLRA under which Jackson was found to have committed unfair labor practices provide:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .

Section 8(a)(1) & (2), 29 U.S.C. § 158(a)(1) & (2) (1976).

Local 1814 was found in violation of the following provision:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . .

Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1976).

of both the Employer and Union. *See* Brief for Petitioner Jackson at 19; Brief for Petitioner Local 1814 at 18. Preliminarily, this Court notes that the decision of the ALJ, whose factual findings the Board adopted, carefully analyzed the evidence concerning the responsibility of Local 1814, and drew reasonable inferences therefrom.

In considering petitioners' contentions, we begin with several broad controlling principles. First, the mere fact that particular acts of individuals are criminally punishable does not render the Act's proscription of unfair labor practices inapplicable to a course of conduct. Section 10(a), 29 U.S.C. § 160(a);[13] *see Sweater Bee by Banff, Ltd.*, 197 N.L.R.B. 805, 805 (1972), *enforced sub. nom. NLRB v. Suwanee Lumber Manufacturing Co.*, 467 F.2d 944 (5th Cir. 1972), *enforced*, 486 F.2d 1395 (2d Cir. 1973). On the other hand, the unfair labor practices provisions of the NLRA regulate the conduct of employers and labor organizations only—not the acts of individuals as individuals. *See International Longshoremen's and Warehousemen's Union (Sunset Line & Twine Co.)*, 79 N.L.R.B. 1487, 1507 & n.37 (1948). The question here, as to the alleged unfair labor practices of both Employer and Union, is whether the individual acts can properly be attributed to the Union. *See Sunset Line & Twine Co., supra*, 79 N.L.R.B. at 1507.

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[13] Section 10(a) of the Act provides:

> The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . . *This power shall not be affected by any other means of adjustment or prevention* that has been or may be established by agreement, law, or otherwise . . . .

29 U.S.C. § 160(a) (1976) (emphasis added). The italicized language of section 10(a) refutes, by itself, the dissent's suggestion that the existence and availability of 29 U.S.C. § 186 forecloses the Board from remedying the kickback scheme here presented as it would any other unfair labor practice.

To answer this question, we turn to the NLRA, which deals with imputation of responsibility as follows:

> In determining whether any person [14] is acting as an "agent" of another person so as to make such other person responsible for his acts, the *question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.*

Section 2(13), 29 U.S.C. § 152(13) (1976) (emphasis added). Without more, the plain language of the statute renders entirely ineffectual Local 1814's reliance on the ALJ's conclusion that Anastasio had not been authorized to enter into kickback arrangements with employers. *See* Brief for Petitioner Local 1814 at 25-26 (quoting ALJ Decision at 27 (JA 318)). Responsibility is not dependent upon actual authorization.

Furthermore, the statutory provision yields an affirmative basis for holding the Union responsible for its officers' acceptance of the payments within the context of the kickback scheme: the principles of agency law. Section 2(13) of the Act was added by the Taft-Hartley Act of 1947, 61 Stat. 136 (June 23, 1947). Beyond doubt, the legislative intent of this provision was to make the ordinary law of agency applicable to the attribution of individual acts to both employers and unions. *See, e.g., Sunset Line & Twine Co., supra,* 79 N.L.R.B. at 1507-08; *accord Mullett v. NLRB,* 571 F.2d 1292, 1294 (4th Cir. 1978); *NLRB v. Local 3, IBEW,* 467 F.2d 1158, 1159 (2d Cir. 1972); *NLRB v. International Brotherhood of Boilermakers, Local No. 83,* 321 F.2d 807, 810 (8th Cir. 1963).[15] Transplantation of ordinary

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[14] Within the NLRA, the term "person" includes individuals, labor organizations, and corporations. Section 2(1), 29 U.S.C. § 152(1) (Supp. V 1981).

[15] Legislative history reveals that Senator Taft offered the following analysis of section 2(13):

agency law, which arises out of ordinary contract and tort disputes, into the NLRA context necessarily requires sensitivity to the particular circumstances of industrial

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This restores the law of agency as it has been developed at common law.

These amendments are criticized in one breath as imposing too harsh a liability upon unions for the acts of their officers or representatives and as too mild with respect to the liability of employers for the acts of their managerial and supervisory personnel. Of course, *the definition applies equally in the responsibility imputed to both employers and labor organizations for the acts of their officers or representatives in the scope of their employment.*

It is true that this definition was written to avoid the construction which the Supreme Court in the recent case of United States against United Brotherhood of Carpenters [United Bhd. of Carpenters v. United States, 330 U.S. 395 (1947)] placed upon section 6 of the Norris-La Guardia Act which exempts organizations from liability for illegal acts committed in labor disputes unless proof of actual instigation, participation, or ratification can be shown. The construction the Supreme Court placed on this special exemption was so broad that Mr. Justice Frankfurter, speaking for the dissenting minority, pointed out that all unions need do in the future to escape liability for the illegal actions of their officers is simply to pass a standing resolution declaiming such responsibility. [330 U.S. at 413, 421 (Frankfurter, J., dissenting)] *The conferees agreed that the ordinary law of agency should apply to employer and union representatives.* Consequently, when a supervisor acting in his capacity as such, engages in intimidating conduct or illegal action with respect to employees or labor organizers his conduct can be imputed to his employer regardless of whether or not the company officials approved or were even aware of his actions. *Similarly union business agents or stewards, acting in their capacity of union officers, may make their union guilty of an unfair-labor practice when they engage in conduct made an unfair-labor practice in the bill, even though no formal action has been taken by the union to authorize or approve such conduct.*

93 Cong. Rec. 6858-59 (June 12, 1947) (emphasis added). Numerous other references in the legislative history of the

labor relations. Courts have concluded that under the NLRA, agency principles must be expansively construed, including when questions of *union* responsibility are presented. *See NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976); *NLRB v. Urban Telephone Corp.*, 499 F.2d 239, 243 (7th Cir. 1974). In reviewing the Board's determination that Local 1814 was responsible for these acts, this Court recognizes that the existence of an agency relationship is a factual matter, *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141 (9th Cir.), *cert. denied*, 429 U.S. 895 (1976), which cannot be disturbed if supported by "substantial evidence on the record considered as a whole." *Local 349, IBEW v. NLRB*, 357 F.2d 579, 580 (D.C. Cir. 1965); *see NLRB v. Local 815, International Brotherhood of Teamsters*, 290 F.2d 99, 104 (2d Cir. 1961) (Friendly, J.).

The branch of agency law best suited to this case is the "scope of employment" doctrine. Among the most firmly established principles in our law is that a principal may be held responsible for the acts of an agent committed within the scope of employment. *See, e.g., American Fur Co. v. United States*, 27 U.S. (2 Peters) 358, 364 (1829); *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469-70 (1827) (Story, J.). The scope of employment doctrine has found frequent articulation in the NLRA context. In the seminal case of *Sunset Line & Twine Co.*, the Board recognized that:

> A principal may be responsible for the act of his agent within the scope of the agent's general au-

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Taft-Hartley amendments support this interpretation of this provision making basic agency law equally applicable to the attribution of actions to both employers and unions. *See, e.g.*, House Conf. Rept. No. 510, 80th Cong., 1st Sess. 36, 93 Cong. Rec. (House) 6371 (June 4, 1947); 93 Cong. Rec. (Senate) 6442 (June 5, 1947). It goes almost without saying that if a union is guilty of the unauthorized unfair labor practices of its business agents and stewards, that it is similarly responsible for practices of its president and executive vice president.

> thority . . . if the principal *actually empowered the agent to represent him in the general area within which the agent acted.*

79 N.L.R.B. at 1509 (footnote omitted) (emphasis added).

The Restatement fleshes out the scope of employment doctrine more fully:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits; [and]
>
> (c) it is actuated, at least in part, by a purpose to serve the master. . . .

Restatement (Second) of Agency, § 228(1) at 504 (1957). The Reporter comments that a showing that an act "tended to accomplish an authorized purpose and was done at an authorized time and place" gives rise to an inference that the act was within the scope of employment. *Id.* § 228, comment b, at 505. The criminality of an act does not alone prevent it from falling within the scope of employment. *Id.* § 231, at 512. Most importantly, the acts of an agent motivated partly by self-interest—even where self-interest is the predominant motive—lie within the scope of employment so long as the agent is actuated by the principal's business purposes "to any appreciable extent." *Id.* § 236 & comment b, at 523-24.

Applying these principles to the case at bar, it is readily apparent that Anastasio's dealings with the Employer were within the "general area" of his authority. Furthermore, his entering into the kickback arrangement with Jackson both "tended to accomplish an authorized purpose"—the extension of his Union's membership—and was motivated "to an[] appreciable extent" by furtherance of the Union's interests in dues and payments for pension and welfare benefits, and principally, the extension of its representation of longshoremen. Ac-

cording to the record, Anastasio *did have actual authority* in the general area of representing the Union in dealing with employers; his authority extended to organizing employees, obtaining recognition, and executing and administering collective bargaining agreements with employers (JA at 295, 147). As the ALJ and the Board properly found, Jackson's recognition of Local 1814, and the concommitant extension of the Union's representation and membership, were "intimately connected" with the kickback arrangement and the concealed payments made pursuant thereto. Anastasio made it clear to Seregos at the outset that the kickback arrangement would *only* be set up if Jackson agreed to recognize Local 1814 as the bargaining representative of its employees. *Thus, Anastasio's exercise of his power to steer business to Jackson—a power directly related to and derived from his position within the Union—was directly conditioned on the Employer's recognition of Local 1814.* Without question, this was a package deal from the start. Thus the kickback scheme was a means to an authorized end, and the patent illegality of the means is immaterial.[16] The existence of an agency relationship is completed by the fact that Anastasio had dual motivations in the arrangement: his own pecuniary advantage, and advancement of the representational objectives of the Union of which he was the second highest-ranking officer.

Local 1814 derived substantial advantages from the unlawful arrangement, and the ALJ so found. *See* ALJ Decision at 28 (JA 319). In this regard, it is crucial to distinguish the interests of the Union itself from those of the employee members of the Union—who themselves

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[16] Unfair labor practices may often involve conduct that is unlawful in other respects. *See supra.* Interestingly, there is at least one case in which a court has upheld the Board's conclusion that an employer's bribery of a high union official constituted an unfair labor practice. *See* NLRB v. Hollywood-Maxwell Co., 126 F.2d 815, 818-19 (9th Cir. 1942).

may not have obtained any new job opportunities out of the payment arrangement. *The Union benefitted from Jackson's recognition of Local 1814 and the concommitant extension of the Union's representation of ship workers.* At the same time, the Union definitely profited from the associated *financial inflow of dues and related fees* into its treasury and pension fund. Finally, the Union benefitted generally from the *extension of its strength and authority* on the New Jersey-New York waterfront. Given his position in the Union and experience in representing it, Anastasio must have understood and expected such potential benefits to the Union. The existence of such benefits renders entirely unavailing the reliance of petitioner Local 1814 on the ALJ's separate finding, not here in dispute, that no evidence demonstrated that the Union itself had received any of the money paid by Jackson,[17] and had not received any other tangible benefit. *See* Brief for Petitioner Local 1814 at 26 (quoting ALJ Decision at 27 (JA 318)).[18]

In sum, the agreement between the Union, the Company, and the Union's two principal officers had four interlocking facets: (1) the Company agreed to recognize the union; (2) the Company by checkoff would pay the Union, for all its employees, their dues, fees, and payments for

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[17] In United States v. Scotto, *supra*, 641 F.2d at 51, the Second Circuit noted the existence of some evidence that Scotto had used some of the illegal payments involved in that case for political campaign contributions. The Union might benefit from such payments.

[18] The ALJ's findings that the Union had so benefitted refutes the argument of the dissent that no evidence linked the kickback payments to Local 1814. Likewise, the facts found by the ALJ contradict the dissent's assertion that the Union officers' entering into the kickback arrangement was in no way motivated by a desire to serve the Union. Anastasio's participation in the scheme was directly conditioned on the Employer's recognition of the Union, which conferred benefits on Local 1814. The Union's officers acted both for themselves and for the Union.

pension and welfare benefits; (3) the Union would steer, and the Company would receive, ship repair work to the benefit of the Company, its Union members and the Union; and (4) the President and Executive Vice President of the Union would be paid by the Company sums equal to ten percent of the ship repair business that the Company would receive from ship owners whose repair business, because of their subservient relationship to the Union, was subject to Union discretion. It thus appears that the agreement between the Company, the Union, and the Union's principal officers was completely tainted by fraud and corruption from the very beginning.

Furthermore, the Union's retention of Anastasio and Scotto in their high controlling offices, long after the grand jury indictments had put Local 1814 on notice of their misdeeds, is tantamount to acquiescence or condonation of their unlawful acts. The last two payments from Jackson were received by Anastasio *after* the Union had knowledge of the criminal investigation. The continuation of the acceptance of the benefits of the kickback arrangement under such circumstances supports the inference that the Union had prior knowledge of the arrangement and that Anastasio was motivated in part by the Union's interests. Under such circumstances, one might reasonably have expected a truly upright union to have taken *some* disciplinary action. As the ALJ astutely recognized, it is hardly imaginable that any greater degree of union responsibility could be demonstrated in such a case: the membership certainly cannot formally authorize an arrangement of which it is unaware, and would certainly never directly ratify an illegal arrangement once it had been exposed. Thus, a decision absolving Local 1814 of responsibility for the acceptance by its highest officers of financial contributions would be tantamount to a blanket determination that a union could *never* be held so responsible under the NLRA. We reject that alternative. We conclude that Anastasio's actual authority over represen-

tational matters in general, together with the substantial benefits received by Local 1814 as a result the entire agreement of which the kickback arrangement was an integral part, constitute substantial evidence on the record as a whole, *see* 29 U.S.C. § 160(f) (1976); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in favor of the Board's conclusion that the Union was legally responsible for Anastasio's acts as agent for the Union.

Extensive case law under the NLRA concerning agency relationships within unions buttresses our conclusion. In *Mullett v. NLRB*, 571 F.2d 1292 (4th Cir. 1978), the business manager of a union, who had both authority to remove men from a job and responsibility for seeing that union members were hired before outsiders, had tacitly approved members' actions that had led to the unlawful dismissal of a non-member. Notwithstanding the manager's lack of actual authority to take such actions, the Fourth Circuit concluded that the union official's wrongful conduct could be attributed to the union. *Id.* at 1294. Similarly, in *NLRB v. Georgetown Dress Corp.*, *supra*, 537 F.2d at 1244-45, the acts of a voluntary in-plant committee that tainted the election atmosphere were held attributable to the union, notwithstanding the absence of authority for those acts. Likewise, where a union dispatcher with general authority to dispatch longshoremen to employers unlawfully discriminated against non-union casuals, the Ninth Circuit held the union responsible for commission of an unfair labor practice, notwithstanding the fact that the dispatcher's discrimination was contrary to the established practice of the local. *NLRB v. International Longshoremen's and Warehousemen's Union, Local 12*, 378 F.2d 125 (9th Cir.), *cert. denied*, 389 U.S. 846 (1967).

The import of these illustrative cases is clear: where union officials act within the general scope of their actual authority to conduct union business, and where their actions can be understood to further the union's interests,

the union is responsible for the officials' unlawful acts. Numerous other decisions provide further support.[19] In comparison to these cases, one particular instance in which the union was held not responsible is quite instructive. In *NLRB v. Service Employees International Union, Local 254*, 535 F.2d 1335, 1338 (1st Cir. 1976), the court held the union responsible for certain acts, but found no violation concerning an isolated act of violence by a union picket, where there was no sign of union acquiescence in, or approbation of, the assault. In contrast to that case, Anastasio's conduct—recurrent acceptance of unlawful assistance from the Employer under an illicit agreement—was calculated and continuous. Local 1814, furthermore, was silent after it was aware of evidence of the misconduct of its officers, continuing to accept the benefits of the illegal agreement, and leaving Scotto and Anastasio in office for many months without taking any steps to discipline or remove the two.

The very cases offered by petitioners serve to refute the argument that no agency relationship existed. Not surprisingly, petitioners avoid case law under the NLRA, preferring to focus on general agency law. Even this approach, however, is ultimately unavailing. For instance, petitioners rely on cases in which thefts by employees were not attributed to their employers to create liability. *International Distributing Corp. v. American District Telegraph Co.*, 569 F.2d 136, 139 (D.C. Cir. 1977); *Bremen State Bank v. Hartford Accident & Indemnity Co.*, 427 F.2d 425, 428 (7th Cir. 1970).[20]

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[19] *See* Sheet Metal Workers' Int'l Ass'n v. NLRB, 293 F.2d 141 (D.C. Cir.), *cert. denied*, 368 U.S. 896 (1961); NLRB v. Int'l Longshoremen's and Warehousemen's Union Local 10, 283 F.2d 558, 564 (9th Cir. 1960); NLRB v. Local 135, Int'l Bhd. of Teamsters, 267 F.2d 870, 872-73 (7th Cir.), *cert. denied*, 361 U.S. 914 (1959).

[20] *Cf.* Park Transfer Co. v. Lumbermen's Mutual Casualty Co., 142 F.2d 100, 100 (D.C. Cir. 1944) (employer not responsible for murder of employee by co-worker in racial incident

In those cases, like that at bar, the employees' job responsibilities give rise to the opportunity for the misdeed. The critical distinction, however, lies in the fact that the employees' acts in the cited cases *cannot possibly* be understood to further the interests of the employer. Outright thefts by employees confer no benefit whatsoever on the employer, and it would be absurd to maintain that employees were even partially motivated by the employer's interest when they commit such crimes.

Further illustration is provided by another case upon which petitioners rely, *Melton v. United States*, 488 F. Supp. 1066 (D.D.C. 1980), in which a government rehabilitation specialist had been bribed by a developer to falsify reports. The government was held not to be responsible under agency principles for the acts of its specialist, because his unlawful acts could not be regarded as furthering the government's interests. *Id.* at 1073-74. Significantly, the simple question of who ended up with the bribe money was *not* considered determinative: the totality of the parties' interests were taken into consideration. *Id.* When the sort of all-embracing approach evident in petitioners' authority is applied to this case, it becomes evident that the Board was correct to conclude that the conduct of Anastasio and Scotto was within the "scope of employment." [21] Their kickback arrangement

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on the job site); Grimes v. Saul, 47 F.2d 409 (D.C. Cir. 1931) (rape committed by employee not attributed to building owner).

[21] Because we hold that the Union officials' acts were within the "scope of employment" under agency law, we need not address the NLRB's alternative theory for the agency relationship, the "apparent authority" doctrine. *See* Brief for Respondent at 18-19, 21-25. We note, however, that the "apparent authority" strain of agency law has been applied under the NLRA as an independent theory for the attribution of responsibility to a union. *See* NLRB v. Local 3, IBEW, 467 F.2d 1158, 1160 (2d Cir. 1972); NLRB v. Local 815, Int'l Bhd. of Teamsters, 290 F.2d 99, 103-04 (2d Cir. 1961) (Friendly, J.). By analogy, the Supreme Court has given

foreseeably and effectively benefitted the Union and furthered the Union's interests. We conclude that the acceptance of the money—a prohibited form of employer payment and assistance—by the Union's principal officers is properly attributable to Local 1814, and gave rise to a finding that both the Employer and the Union engaged in unfair labor practices.

IV. The Board's Remedial Actions

Both the Union and Employer challenge the Board's statutory authority to order the remedial measures that it did. The essence of their complaints is that the "remedies punish Local 1814 for conduct beyond its control and conflict with the purposes of the Act." Brief for Petitioner Local 1814 at 31. Recognizing the NLRA's remedial nature, and the Board's considerable remedial discretion, this Court cannot agree that the Board exceeded its authority or abused its discretion in ordering affirmative relief as it did. Viewed pragmatically, the Board, when faced with the egregious pattern of concealed unlawful assistance

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approval to the liberal development of "apparent authority" doctrine to hold organizations responsible for the acts of their high officials in the context of other federal statutes. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (Sherman Act); United States v. Acme Process Equip. Co., 385 U.S. 138 (1966) (Anti-Kickback Act provides basis for United States' cancellation of contract).

Apparent authority doctrine, however, may not be well-suited to a case such as this. When working within that doctrine, one must remain attentive to the question of to whom authority might be said to be "apparent." In the typical unfair labor practice, the critical audience is the workforce: the Act primarily protects their interests. Apparent authority doctrine under the NLRA has so recognized. In this case, however, the record nowhere indicates that Jackson's employees were aware of the kickback arrangement, at least until the supervening indictment in the criminal case was issued. Thus as an audience, the employees were shielded from most of this performance.

before it, was justified in ordering a completely fresh start to relations between Jackson and its employees.

A. *Background: The Board's Remedial Discretion*

The NLRA vests in the Board broad discretion to remedy unfair labor practices:

> If . . . the Board shall be of the opinion that any person named in the complaint has engaged in . . . any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order *requiring such person to cease and desist* from such unfair labor practice, *and to take such affirmative action . . . as will effectuate the policies of this chapter* . . . .

Section 10(c), 29 U.S.C. § 160(c) (1976) (emphasis added); *see also* Section 10(a), 29 U.S.C. § 160(a) (1976) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . ."). The Supreme Court has consistently recognized the great breadth of discretion given the Board in remedial matters, thus implementing Congress' intention to entrust labor-management relations to a policy-making administrative body:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941); *see International Association of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 82 (1940). The Court has also identified the need for judicial deferrence to the specialized expertise of the NLRB, frankly acknowledging that the Board's remedial "conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . .'" *NLRB v.*

Seven-Up Bottling Co., 344 U.S. 344, 348 (1953) (citation omitted).

Accordingly, judicial review of Board-ordered remedies has a narrow scope. The reviewing court must satisfy itself that the Board has employed its expertise, and has fulfilled its duty to explain how the proposed remedy furthers the policies of the Act. *See Phelps Dodge*, *supra*, 313 U.S. at 196-97. In addition, the court must ultimately ensure that the selected remedy is rationally related to the purposes asserted by the Board, and does not conflict with any statutory purpose. *See Seven-Up Bottling Co.*, *supra*, 344 U.S. at 346-48; *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938); *NLRB v. MacKay Radio & Telepraph Co.*, 304 U.S. 333, 348 (1938). Some decisions have spoken of the Act as barring "punitive" rather than remedial measures, but the Supreme Court has made it clear that the punitive-remedial distinction is merely a way of restating the underlying question of whether a given remedy furthers, and is in no manner inconsistent with, the purposes of the Act. *Seven-Up*, *supra*, 344 U.S. at 348; *Consolidated Edison*, *supra*, 305 U.S. at 235-36. In the remedial context as in others, the central purposes of the Act are the encouragement of collective bargaining and the protection of employees' rights to freedom of association and free choice of bargaining representatives. *See* 29 U.S.C. §§ 151, 157 (1976 & Supp. V 1981).

This Court's duty is to ascertain whether the remedies ordered by the Board are proximately tailored to the facts of this case. The remedies selected by the Board are virtually routine in large classes of cases, so it is not the novelty of the remedies that should be our concern. Rather, the question is whether these routine remedial measures are appropriate to the violations here presented. Several facts underlying the unfair labor practices in question are of particular significance. First, the corrupt arrangement went back to the very origins of the parties'

relations, and actually *predated* the Employer's recognition of the Union. Second is the extreme degree of collaboration between Jackson and Local 1814: although Local 1814 was not a "company union" in the traditional sense, its ties under the kickback arrangement were very strong. The involved officers of the Union, without being employees, in effect were paid for the services they were able through the strength of the Union in the shipping industry to render to Jackson.

Finally, we have the *concealment* of the unlawful assistance payments in this case. Such payments usually furnish the basis for the criminal prosecution of the recipients, but here they furnish the basis for the unfair labor practices. The more usual unfair labor practice case based on company assistance to the union involves more open management contributions of money or services to the union—assistance of which the employees would presumably be aware. In this case, there is no evidence that Jackson's employees could have known of the kickback arrangement until the issuance of the superseding indictment.

Recognizing the broad contours of the NLRA's remedial scheme, and attentive to the peculiar facts of this case, this Court has considered each of the contested remedies ordered by the Board. We find that the Board's decision represents nothing more than a sensible application of routine remedial practices to a slightly unusual case, and that its orders were entirely consistent with the purposes of the Act. The Board's approach is based on holding the Union responsible for its officers' acts and on restoring the employees to the position they would have enjoyed but for the illegal arrangement.

B. *The Cease-and-Desist Order Directed to the Union*

Local 1814 contests the Board's order directing the Union to cease and desist from entering an arrangement "where it receives payments from Jackson," and to post

a notice declaring that the Union will never again enter into such a scheme. Board Decision at 10, 11 (JA 405, 406). This objection is easily disposed of, for it is little more than a renewal of the argument that Local 1814 cannot be held responsible for the actions of its officers.

The Board has specific authority to order cease-and-desist orders to employers and unions, 29 U.S.C. § 160(c), *supra*, and such orders are the staple of the NLRB's remedial practice. In particular, for instance, the Board has ordered an employer to cease and desist from bribing a union official. *See Hollywood-Maxwell, supra*, 126 F.2d at 818-19. The proper scope of a cease-and-desist order is determined only by inquiry into whether the Board could reasonably conclude from the evidence that the order was necessary to prevent further violations. *See May Department Stores Co. v. NLRB*, 326 U.S. 376, 390 (1945). Notwithstanding the Board's plenary authority to issue such orders, the Union maintains that in this case cease-and-desist orders are inappropriate, because they "will not prevent a recurrence of the unfair labor practices the Board found here, since in this case *Local 1814* never received any of the money Seregos paid Anastasio." Brief for Petitioner Local 1814 at 51 (emphasis in the original). As the entirety of section III of this opinion demonstrates, *supra*, the absence of any evidence that the Union received illegal payments is *not* dispositive of whether the Union was unlawfully assisted. The actions of Anastasio and Scotto are properly attributable to the Union. Local 1814 has the authority and responsibility to control the conduct of its highest officers and is responsible for their acts to the extent hereinbefore set forth. Thus the cease-and-desist orders directed to the Union were the natural concomitant of the Board's substantive findings in the case. The remedy fits the facts. The orders issued to Local 1814 were neither unfair nor misleading. In sum, we find no infirmity in this portion of the Board's order.

C. *The Board's Order that the Employer Withdraw Recognition of Local 1814 as Exclusive Bargaining Representative of the Employees*

In addition to the straightforward cease-and-desist orders approved by the ALJ, the Board ordered several affirmative remedies on the part of the two petitioners. The first such remedy consists of the portions of the Board's order compelling the Employer to cease recognizing Local 1814 as the exclusive bargaining representative of its employees until the Union has been certified by the NLRB, and requiring the Union to cease acting as the representative of Jackson's employees. Board Decision at 7, 8, 11 (JA 402, 403, 406). Petitioner Local 1814 attacks this remedy as "punitive," arguing that it "conflicts with [Jackson's] employees' rights under § 7 of the Act, because Local 1814 was the chosen representative of an uncoerced majority of Jackson's employees at all relevant times." Brief for Petitioner Local 1814 at 32; *see id.* at 34, 38-39.

The Board's standard practice in cases involving extensive unlawful assistance of a union is to issue the type of decertification order here presented. *See, e.g., NLRB v. American Beef Packers, Inc.*, 438 F.2d 331 (10th Cir.), *cert. denied*, 403 U.S. 919 (1971); *American Bakery & Confectionary Workers International Union v. NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967); *Bowman Transportation, Inc.*, 120 N.L.R.B. 1147, 1151 (1958). The principal remedial issue in this area has revolved around the distinction drawn between "employer domination" and the lesser offense of "employer assistance;" the former has been remedied by complete disestablishment of the union, while the latter has been corrected by the less absolute means of decertification.[22] Under the Board's established remedial practice, the purposes behind a de-

[22] For evidence of this distinction at work, see NLRB v. District 50, UMW, 355 U.S. 453, 458-59 (1958), and the numerous cases cited therein.

certification order are clear: to allow the effects of an unfair labor practice to be dissipated, pending the establishment of the majority status of the union in an election free of restraint and coercion. *See NLRB v. District 50, UMW*, 355 U.S. 453, 459-60 (1958). Under such circumstances, the central policy of the NLRA is served—employees are given a true opportunity, after a breathing spell, to choose freely their bargaining representative. *See id.*

In this case, the Board ordered the decertification remedy on the basis of its established practice and of the statutory purposes fulfilled by that practice. *See* Board Decision at 5 (JA 400). The Board had found unfair labor practices on the part of both the Employer and the Union, the core substances of which were respectively the Employer's concealed assistance of the Union, and the Union's capitulation, through its two principal officers, of its independence and undivided loyalty to those whom it represented. Noting the contract concessions made by the Union during the 1979 renegotiation of the collective bargaining agreement, the Board emphasized that the unfair labor practices had "operated to *taint and undermine* the bargaining relationship between" the Employer and Union. *Id.* (emphasis added). That finding was central to the Board's imposition of the decertification remedy as a means of allowing for a fresh start to the labor-management relations of Jackson's employees. As such, it appears to be the real target of petitioners' objections to the affirmative remedies in question. However, we find that the Board's finding of a "taint" was supported by substantial evidence on the record as a whole:[23] the long-standing illicit kickback arrangement went to the very core of the parties' working relationship. The corrupt agreement to provide the unlawful assistance pre-dated the Employer's recognition of Local 1814 by several

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[23] *See* 29 U.S.C. § 160(f) (1976); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

months, and was a condition imposed by the Union's officials prior to entering into the collective bargaining agreement. The final payments were made even after the indictments, and even as the 1979 negotiations were getting underway. *See* ALJ Decision at 4-9 (JA 295-300). By necessity, a union represents its membership through its officers, and in this case Local 1814's officers had been thoroughly corrupted. The Union's representation of Jackson's workforce was thereby tainted.

In contesting the Board's decertification remedy, petitioners rely heavily on the ALJ's findings that Local 1814 had enjoyed majority status among Jackson's employees. *See* ALJ Decision at 22, n.36, 40, 42 (JA 313, 331, 333). Petitioner Jackson observes that the typical employer assistance case in which the NLRB orders decertification involves conduct which assists the union in obtaining majority status. Brief of Petitioner Jackson at 11. The main thrust of this argument is that where majority status has been demonstrated, a decertification order cannot be reasonably imposed because the initial recognition of the union was not flawed in any way. *See id.* at 12-13. There are two potent responses. First, the Board has the remedial authority and responsibility to apply its discretion to all factual configurations that come before it; issuance of certain remedies is not limited to standard factual situations. Second, the unlawful agreement to provide the assistance in this case was entered into in July, 1975 (JA 295), and predated the September date when a majority of the employees expressed a preference for the Union (JA 296). The evidence thus strongly demonstrates that the kickback arrangement was an integral part of the mutual understanding that initially led Jackson to consent to recognition. The Supreme Court has recognized that the existence of majority status is not necessarily determinative of whether employer assistance has overriden the employees' free choice. *See NLRB v. Newport News Co.*, 308 U.S. 241, 248-51 (1939). We conclude that imposition of the decertification remedy

here "properly reconcile[s] the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative." *District 50, UMW, supra,* 355 U.S. at 461.[24]

Finally, Local 1814 argues that the absence of demonstrable coercion of the Jackson workforce precludes the decertification remedy. Brief for Petitioner Local 1814 at 37-40. This demand for a showing of "coercion" is highly disingenuous, to say the least. In this case, the Board was inherently prevented from introducing outward evidence of coercion because from the very outset the unlawful assistance payments were effectively concealed from Jackson's employees, as from the world at large. Thus petitioner's argument amounts to little more than an assertion that because the Employer and Union succeeded so long and so well in concealing their transgressions, the unfair labor practices found here cannot be remedied. The Board's decertification order saw through this argument. This Court finds a sufficient factual nexus between the underlying facts, the violations found, and the remedy of decertification. The Union has not been

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[24] Both in its brief, Reply Brief for Petitioner Jackson at 15, and at oral argument, Jackson adopted the position that approval of decertification here must necessarily be equated with the proposition that once the Employer became aware of the violations, it was legally obligated to cease recognizing the Union, even in the absence of any Board action in the matter. We emphasize that the latter situation, in which there has been no administrative or legal determination that an unfair labor practice has occurred, is clearly distinguishable from that at bar, and is most certainly *not* before this Court. We do not imply that an employer placed in the situation hypothesized would be obligated in the manner that Jackson suggests. We note, however, the decision of the Ninth Circuit that where the employees had designated a union as their bargaining agent, and had later discovered that a union official had accepted bribes from the employer, the employees were empowered to revoke the prior designation, and the employer was then justified in refusing to bargain with the union. *See Hollywood-Maxwell, supra,* 126 F.2d at 819-20, 823.

irrevocably disestablished: if Local 1814 truly enjoys majority status among Jackson's employees, then the Union will be able to demonstrate its majority status in an election conducted free from the tainted atmosphere that so long pervaded relations between this Employer and Union.

D. *Abrogation of the 1979 Collective Bargaining Agreement*

Petitioners next contest the Board orders requiring Local 1814 and Jackson to cease giving effect to the 1979 collective bargaining agreement between the parties—including all dues checkoff cards executed pursuant thereto—until the Union has been certified by the NLRB. Board Decision at 6, 8, 10-11 (JA 401, 403, 405-06). Because the Board provided the employees substantive protection from the Employer disregarding the terms of the contract,[25] the abrogation remedy is essentially only a corollary to the decertification remedy. Like that remedy, abrogation was based on the central finding of the Board, which we endorsed above—that the illegal concealed payments, particularly when viewed together with the contract concessions, had served to "taint and undermine" the parties' bargaining relationship. Concerning the abrogation of the collective bargaining agreement, we affirm the Board's conclusion that in light of the fact that Anastasio and Scotto had remained as officers of the Un-

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[25] In order to protect the employees' substantive interests, the Board provided the following:

> Nothing in our Order . . . shall be deemed to require [Jackson] to vary or abandon those wage, hour, seniority, or other substantive features of its relations with employees established in the performance of the aforementioned collective-bargaining agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.

Board Decision at 6-7 (JA 401-02) (citing Sweater Bee by Banff, Ltd., 197 N.L.R.B. 805 (1972)).

ion, "their divorce from the actual negotiations" was not determinative of whether those negotiations had been tainted. Board Decision at 5 (JA 400).

Like the decertification remedy, the abrogation remedy is designed to dissipate the effects of unfair labor practices and to protect employees' statutory rights. In unlawful assistance cases where the violation has had some impact on the contract in question, the abrogation remedy is virtually routine. *See, e.g., International Association of Machinists, supra,* 311 U.S. at 75; *American Bakery & Confectionary Workers International Union, supra,* 379 F.2d at 163; *Ditzler Mechanical Contractors, Inc.,* 259 N.L.R.B. 610, 612-13 (1981); *Jeffrey Manufacturing Co.,* 208 N.L.R.B. 75 (1974); *Bisso Towboat Co.,* 192 N.L.R.B. 885 (1971).

In attacking the abrogation remedy, petitioner Jackson argues that "there is simply no connection between the unlawful payments and what has been nullified by the Board." Reply Brief for Petitioner Jackson at 14; *see* Brief for Petitioner Local 1814 at 44-45. Petitioners rely on the findings of the ALJ that the modified collective bargaining agreement had been the product of hard bargaining. *See* ALJ Decision at 42 (JA 333). In addition, petitioners assert that the unlawful payments and the contract concessions were not truly contemporaneous, in that the payments ceased shortly *before* the 1979 contract was executed. *See* Brief for Petitioner Local 1814 at 42; Reply Brief for Petitioner Jackson at 14. Therefore, they conclude, the 1979 modified contract was not the "fruit" of the illegal assistance, within the sense of *Consolidated Edison, supra,* 305 U.S. at 236, 238.

We cannot so easily dismiss the Board's conclusion that the illegal assistance was sufficiently proximate to the 1979 negotiations, in both time and practical impact, to support the abrogation remedy. The last illegal payment was made even as the negotiations were getting under way. As we have indicated, the kickback arrangement

went to the very heart of the Jackson-Local 1814 relationship through the summer of 1979. Like its highest officers themselves, the Union's representation of the Jackson employees had been thoroughly corrupted. In this context, the fact that Scotto and Anastasio, still the Union's highest officers with no diminution of their internal authority, did not actually take part in the negotiations amounts to a mere formality. The Board has fulfilled its responsibility to tailor the remedy to the violation: it demonstrated with reasonable specificity the impact of the illegal assistance on the parties' bargaining relationship and on the modification negotiations in 1979. Petitioners would simply have the Board ignore the forest for examining the trees. Given the magnitude of the violations presented, the Board's "taint and undermine" finding, as applied to the 1979 modifications, was no great leap. That taint on the agreement warrants abrogation thereof. The Board's order, however, does leave open the possibility that the contract may be reinstated when and if the NLRB certifies the Union.

E. *The Reimbursement of Dues*

The final contested remedy is the Board's order that the Employer and Union, jointly and severally, reimburse all employees who joined the Union after the 1979 contract for all dues and fees extracted from those employees under the collective bargaining agreement. *See* Board Decision at 6, 8-9, 11 (JA 401, 403-04, 406). Petitioners contend that reimbursement is unwarranted because there was no showing that employees had been coerced into joining the Union and paying dues, and because the union security clause in the 1979 collective bargaining agreement was entirely legal.[26]

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[26] As a threshold matter, the Court holds that the Board was not precluded from ordering reinstatement by either the ALJ's decision not to recommend that remedy, or the absence of an exception on that point by the General Counsel—or by

The reimbursement remedy is another way of dissipating the effects of unlawful labor practices, and also restores to employees that which was unlawfully taken from them. On these bases, the Board has long ordered repayment of dues where employees, as a requirement of employment, were unlawfully required to support a union. *See Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 539-45 (1943). Reimbursement may be ordered when the union is assisted, as well as when it is "dominated." *See, e.g., NLRB v. Vernitron Electrical Components, Inc.*, 548 F.2d 24, 27 (1st Cir. 1977); *NLRB v. Revere Metal Art Co.*, 280 F.2d 96, 100-101 (2d Cir.), *cert. denied*, 364 U.S. 894 (1960). In either case, the continued existence of a union security clause may compel union members to financially support a union that has compromised its undivided loyalty to the employees.[27]

There is no dispute that the 1979 collective bargaining agreement contained, as had the predecessor agreement, both a union security clause and a dues checkoff provision. Nonetheless, petitioners argue that reimbursement

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those two factors taken together. NLRB v. WTVJ, Inc., 268 F.2d 346, 348 (5th Cir. 1959) ("Even absent an exception, the Board is not compelled to act as a mere rubber stamp for its [ALJ]."); *see* Hedstrom Co. v. NLRB, 629 F.2d 305, 315-16 (3d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 996 (1981); NLRB v. Duncan Foundry & Machine Works, Inc., 435 F.2d 612, 620 (7th Cir. 1970); Kohler Co., 128 N.L.R.B. 1062, 1096 (1960), *remanded on other grounds sub. nom.* Local 833, UAW v. NLRB, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). The conclusion that the Board was not precluded from ordering this remedy is particularly strong because the reimbursement remedy *was before the ALJ and was briefed* at that stage of this case: the petitioners cannot claim unfair surprise at this later stage.

[27] Under Supreme Court decisions, the question whether union members allegedly receive benefits from union bargaining that they might otherwise not have enjoyed is immaterial to the propriety of a reimbursement order. *See Virginia Electric Power Co., supra*, 319 U.S. at 543-44; *Vernitron, supra*, 548 F.2d at 27.

is inappropriate. First, Local 1814 maintains that the case is controlled by the Supreme Court's decision in *Local 60, Carpenters v. NLRB*, 365 U.S. 651 (1961). That case held that reimbursement was punitive when applied to *long-time union members*, at least in the absence of evidence that those employees had somehow been coerced into joining the union as a condition of employment. *Id.* at 654-66. The Board's reimbursement order here, however, benefits only employees who joined the union *after* the 1979 collective bargaining agreement became effective. Thus the incongruency perceived by the Court in *Local 60, Carpenters*—the reimbursement of longstanding union members, whose membership had not demonstrably been coerced—is absent in this case. Numerous decisions have recognized that reimbursement is entirely proper when applied to employees joining the union *after* the unlawful assistance, and where a union security clause, that is unlawfully acquired, compels payment of dues. *See, e.g., Vernitron, supra*, 548 F.2d at 27; *NLRB v. Raymond Buick, Inc.*, 445 F.2d 644, 645 (2d Cir. 1971). The *Local 60, Carpenters* requirement of demonstrable coercion is simply inapplicable.

Petitioners next produce a series of related arguments, the common core of which is the objection that the 1979 agreement was not unlawful in any way. Both Local 1814 and Jackson reason that because the union security clause in the 1979 agreement was merely carried over from the preceding agreement, that the 1979 clause was not the *result* of any unfair labor practice. Brief for Petitioner Local 1814 at 49-50; Brief for Petitioner Jackson at 41. In addition, petitioners appear to treat the Board's application of the reimbursement remedy *only* to employees joining the Union under the 1979 collective bargaining agreement as some sort of concession that the checkoff of dues was unrelated to the unlawful payments. If the two had truly been related, the argument goes, the Board would have extended reimbursement further back in time. Both arguments miss the mark. Regardless of the pre-

existence of the union security clause, the Board found that the unlawful assistance, particularly in light of the Union's bargaining concessions, had been severe enough to "taint and undermine" the parties' bargaining relationship that led to the 1979 agreement. In that way, the *entirety* of the modified collective bargaining agreement, including the union security and dues checkoff clauses, were infected. That being so, reimbursement was appropriately ordered. The Board's decision not to extend reimbursement further back in time [28] was an exercise of remedial discretion, and in no way detracts from the Board's authority to go as far as it did. The Board is not obliged to adopt an all-or-nothing remedial stance. That the Board might have been justified in going back further than it did is not a sound reason to set aside its order limiting reimbursement to more recent payments.

V.

For the foregoing reasons, this Court upholds the Board's decision that both the Employer and Union committed unfair labor practices. The acts of the Union's officials being properly attributable to the Union itself, the illicit kickback arrangement gave rise to violations on the part of both petitioners. The Board's remedies were reasonably designed to dissipate the effects of those violations, and to prevent their recurrence. We deny the petitions and order that the Board's order be enforced in its entirety.[29]

Judgment Accordingly.

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[28] In so limiting the scope of the reimbursement remedy, the Board cited, without comment, its decision in Unit Train Coal Sales, Inc., 234 N.L.R.B. 1265 (1978), *enforcement denied on other grounds*, 636 F.2d 1121 (6th Cir. 1980). In that case, the Board limited the imposition of its reimbursement remedy to that time frame in which the union security clause could be deemed unlawful. *See id.* at 1273.

[29] The dissent suggests that the foregoing decision would permit the Board to "abrogate . . . any bargaining relationship and any labor contract involving corrupt dealings between the

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employer and union officials." Dissent at 2. That assertion is overbroad and misconstrues this opinion. Our approval of the Board's findings and remedial actions in this case is predicated upon the specific factual situation that was presented to the Board—a situation in which the *entire* relationship between the Union and Company was predicated from the beginning on the unlawful assistance to the Union and subsequent kickbacks to the Union's principal officers. From the very beginning of negotiations it was agreed between the officers of the Union and the Company that the Union would benefit materially from the corrupt arrangement and that the corrupt payments would not begin until the Company's employees joined the Union, and both of these requirements which materially benefitted the Union were complied with before any sums were paid. We intimate no views on other cases, differing in kind or in degree, that might come before the Board.

WALD, *Circuit Judge*, dissenting: Although I, like the majority, abhor the corrupt conduct of the union officials in this case, I have considerable difficulty in enforcing the Board's remedial order against the union on the basis of the record before us. As the majority points out, Maj. Op. at 12, this is apparently the first time in the fifty-year history of the NLRA that the Board has applied the section 8(a)(2) proscription of financial and other support of unions by employers to a scheme of individual corruption involving kickback payments that in no way benefitted the union as an entity.[1] I am not willing to say at this juncture that the Board is not authorized under any circumstances to apply section 8(a)(2) and its decertification remedies to a union so infected by its leaders' corruption that it cannot properly represent its members. But neither am I willing to read the statute as permitting the Board to make this major innovation in the interpretation of the law without any findings or allusions to evidence on the record demonstrating a relationship between the individual officers' corruption and the union's representation of its members. To do so would impermissibly expand the Board's power to intervene in and dissolve collective bargaining relationships vitally affecting the welfare of union members in situations not within the legitimate ambit of section 8(a)(2).

The uniqueness of this case of course does not lie in the corrupt scheme recounted in detail by the majority. Kickbacks of precisely this kind motivated Congress to enact as part of the Taft-Hartley Act a special statute, 29 U.S.C. § 186, proscribing the acceptance of payments by union officials from employers and providing for both criminal penalties and various civil remedies for its violation. Indeed the very existence of 29 U.S.C. § 186 strongly suggests to me that Congress never intended

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[1] Although the Board also found violations of § 8(a)(1) and § 8(b)(1)(A), making it unlawful for an employer and a labor organization respectively to restrain or coerce employees in the exercise of their rights under the labor laws, those violations are entirely derivative of the § 8(a)(2) violation.

section 8(a)(2), a provision designed to deal with the altogether different problem of "company unions," to be applied to kickback schemes like this one.

By its terms, section 8(a)(2) proscribes financial or other support to a *labor organization.* There is absolutely no evidence that any of the kickback money here went into the union coffers or in any other way benefitted the union. ALJ Opinion at 27, J.A. 318. I cannot agree with the majority's attempts to finesse this point by characterizing the payments as simply part of a "package deal" that benefitted the union. The sole basis for the Board's finding of an unfair labor practice was the kickback payments themselves and those payments did not in any way (as far as the record shows) benefit the union. Under the "package deal" theory, the Board could abrogate under section 8(a)(2) virtually any bargaining relationship and any labor contract involving corrupt dealings between the employer and union officials. This would radically expand the Board's power to determine for employees which unions are or are not worthy of their support. The ALJ specifically found that the union here maintained the support of an uncoerced majority, ALJ Op. at 40, J.A. 331. I need not remind this court of the fundamental premise of the National Labor Relations Act that employees should be free to choose their own representatives; we recently rejected a Board decision to issue a bargaining order where the union had not attained majority status because such an order was deemed inconsistent with that premise. *Conair Corp.* v. *NLRB*, 721 F.2d 1355 (D.C. Cir. 1983); *see infra* note 2.

The use of common law agency principles to substitute for a total lack of evidence that the kickbacks benefitted the union does not work. Obviously, as the ALJ noted, we could not expect the union to ratify the illegal actions of its officers. But that truism does not mean that we should presume that every illegal action taken by a union officer to line his own pockets is done by and for the benefit of the union. Indeed, the common law of agency incorporates the opposite presumption, that an illegal act ordi-

narily will not be found within the agent's scope of employment. Although there are situations in which the principal is held liable for such conduct, generally where innocent third parties are the direct victims of the agent's illegal conduct, it remains the general rule that "if the employee committing the crime is acting solely for his own benefit, his employer is not liable." *Melton* v. *United States*, 488 F. Supp. 1066, 1074 (D.D.C. 1980). *See also Hoston* v. *Silbert*, 681 F.2d 876, 880 (D.C. Cir. 1982) (under D.C. law, "foreseeability must be combined with a purpose to further the employer's interest"); Restatement (Second) of Agency § 235. The solicitation and acceptance of kickback payments here appear in no way to have been motivated by the officials' desire to serve their union. Instead it appears from the evidence that Scotto and Anastasio simply exploited their powerful positions as ILA officials. Indeed, it is odd, in light of the Board's attempt to portray this as a routine application of agency principles to what is unfortunately a familiar set of facts, that we have been cited to no prior Board decision that held a union responsible under principles of agency for its officers' acceptance of illegal kickbacks.

The majority, the ALJ and the Board all presume that no direct evidence could be shown—and therefore that none *need* be shown—to link the kickback payments to the union. But that link is precisely what the statute requires—some proof that the employer provided unlawful support *to the union* by virtue of the payments—or at least what agency law ordinarily requires—that Scotto and Anastasio, in soliciting and accepting kickbacks, were acting pursuant to a plan entered into for the benefit of or with the approval of the union as an entity. This would for instance be a different case if there were evidence of widespread knowledge and acceptance of the kickback scheme by other union officers or members. Instead we have only the bare fact of an indictment that came down at the very end of the kickback scheme. Whatever our personal views of what action a "truly upright

union" would take under the circumstances, Maj. Op. at 20, there is no evidence at all in this record of knowledge or ratification by other officers or members so as to fill the gaping holes in the Board's application of agency law.

This would also be a different case if the Board had found on the basis of substantial evidence that the employer or the union had, by virtue of the kickback payments or otherwise, coerced or restrained employees in their choice of bargaining representative, or that the union had failed to represent the employees adequately. Instead, the ALJ specifically found on the evidence before him that Local 1814 had maintained the support of an uncoerced majority, ALJ Op. at 40, J.A. 331, and had provided the employees with "vigorous and effective representation" in spite of the ongoing kickback scheme. ALJ Op. at 42, J.A. 333. Without pointing to a single piece of evidence undermining these carefully supported findings, the Board concluded that the entire bargaining relationship was "tainted." It proceeded to order a set of section 8(a)(2) remedies, including decertification of the union and abrogation of the collective bargaining agreement, that make sense only in the usual 8(a)(2) case, in which the employer's out front assistance to the union carries with it a threat of coercion to the rank and file and therefore undermines the union's claim of majority status. I point out at the risk of tedium the absence of any precedent for the application of these remedies to a case of direct and secret employer payments to officials, apparently inuring solely to the personal benefit of those individual union officials.

If the Board's decision in this case is based on its conclusion that concealed kickback payments of this kind to high union officers are *inherently* coerceive and *necessarily* taint the bargaining relationship, then the Board has introduced a major innovation in the law of labor relations permitting massive government intervention into collective bargaining relationships in the absence of

any *evidence* of coercion or lack of majority status. At the very least the Board is obligated to acknowledge the significance of this innovative use of the NLRA and to justify it.[2] Here, however, we are presented with no link, logical or factual, between the corrupt kickbacks and the need for a complete abrogation of the entire collective bargaining relationship that the Board, reversing the ALJ, ordered as a remedy.

The government has a wide range of remedies and penalties under 29 U.S.C. § 186 that are tailor-made to penalize and rectify the evil of such kickback schemes. Section 8(a)(2) and the traditional remedies for its violation simply do not fit the situation depicted here of corrupt union officers extorting money from the employer solely for their own use. Without proof of any motive to benefit the union or any relationship between their individual greed and the union's activities, I am not convinced that there is a legitimate invocation of section 8(a)(2). However distasteful the misdeeds of these individuals, they do not justify novel remedies that bend the statute out of shape and, in so doing, penalize not the culprits but the union and its members who are, as far as we can tell from this record, only innocent bystanders to the wrongdoing. I respectfully dissent.

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[2] In Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), this court held that the principle of majority support is so central to the statutory scheme that the NLRB may never issue a bargaining order in the absence of evidence that the union had a majority before the employer's coercive conduct took its toll. 721 F.2d at 1377-84. I dissented. In my view, the Board had adequately supported its conclusion that the employer's massive and unprecedented campaign of coercion had eliminated any possibility of a fair election and that a temporary bargaining order was the only possible means of restoring employee freedom of choice. *See id.* at 1387-1401. The majority decides here, ironically, that the principle of majority rule and freedom of choice is so *unimportant* that a collective bargaining representative whose majority status is not in doubt may be ousted on the basis of individual officers' corruption bearing no demonstrated relationship to the quality of the representation in collective bargaining.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1113 September Term, 1983

Local 1814, International Longshoreman's Association, AFL-CIO

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 83-1117

BEFORE: Wilkey and Wald, Circuit Judges, and MacKinnon, Senior Circuit Judge

ORDER

On consideration of the Petition for Rehearing of Petitioner-Cross Respondent, Local 1814, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:
GEORGE A. FISHER, Clerk

By:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wald would grant the Petition for Rehearing.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1113 September Term, 1983

Local 1814, International Longshoreman's Association, AFL-CIO

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 83-1117

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of Petitioner-Cross Respondent, Local 1814, has been circulated to the full Court and a majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:
GEORGE A. FISHER, Clerk

By:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judge Wald, Edwards and Ginsburg would grant the Suggestion for Rehearing *en banc*.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

JACKSON ENGINEERING CO.

and — Case No. 29-CA-7498

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO and LOCAL 17, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO

and

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Party to the Contract

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO (JACKSON ENGINEERING CO.)

and — Case No. 29-CB-3966

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO and LOCAL 17, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO

and

JACKSON ENGINEERING CO.

Party to the Contract

Stanley, L. Goodman, Esq. and *Steven M. Swirsky, Esq.*, Brooklyn, NY for General Counsel.
Andrew E. Zelman, Esq. and *Jeffrey H. Lapidus, Esq. (Seham, Klein & Zelman, Esqs.)* New York, NY for Respondent Employer.
Howard Schulman, Esq. and *Donald L. Sapir, Esq. (Schulman & Abarbanel, Esqs.)* New York, NY for Respondent Union.
Michael Brodie, Esq. (Freedman & Lorry, Esqs.) Philadelphia, Penn. for Charging Parties.

DECISION

Statement of the Case

STEVEN B. FISH, Administrative Law Judge: Pursuant to charges and amended charges filed by Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, herein called Charging Parties or IUMSWA, the General Counsel of the National Labor Relations Board by the Regional Director for Region 29 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing on May 30, 1980 and a Consolidated Amended Complaint on October 7, 1980. The Complaint as amended alleges that Jackson Engineering Co., herein called Respondent Employer or Jackson, violated Section 8(a)(1), (2) and (3) of the Act and that Local 1814, International Longshoremen's Association, AFL-CIO, herein referred to as Respondent Union or ILA, violated Section 8(b)(1)(A) and (2) of the Act, by *inter alia*, on September 13, 1979,[1] executing and thereafter maintaining and enforcing a collective bargaining agreement with respect to Jackson's em-

[1] Unless otherwise obtained all dates hereinafter referred to are in 1979.

ployees, containing a Union Security Clause, notwithstanding the fact that a real question concerning the representation of said employees had been raised and was pending by virtue of requests for recognition made by IUMSWA. The Complaint also alleges that Jackson violated Section 8(a)(1) and (2) and ILA violated Section 8(b)(1)(A)of the Act, by virtue of an arrangement in existence from 1975 to 1979 whereby Jackson made concealed payments to Anthony Scotto and Anthony Anastasio, president and executive vice-president of the ILA, respectively, in amounts equal to ten percent of the additional volume of business resulting from referrals to Jackson by the ILA.

A hearing on the issues encompassed by said complaint was heard before me in Brooklyn and New York, New York on October 27, 28 and 29, 1980 and on June 3 and 4, 1981.[2]

Briefs which have been received from General Counsel, Respondent Company and Respondent Union, have been carefully considered, and I might add were all excellently prepared and most helpful in assisting my deliberations herein.

Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Employer, a New Jersey corporation, is engaged in the business of performing maritime ship maintenance, building and repair services and related services, with places of

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[2] Although not appearing at the hearing, Counsel for the Charging Parties submitted a motion to the Chief Administrative Law Judge, which was referred to me for disposition, requesting withdrawal of the charges herein. Said request had previously been denied by the Regional Director for Region 29, by letter dated October 1, 1980, except for the portion of the charge in Case No. 29-CB-3966 insofar as it relates to the International Longshoremen's Association, AFL-CIO, which had been named a Respondent in the original Complaint issued on May 30, 1980. The Amended Complaint issued on October 7, 1980, pursuant to the Director's approval of the partial withdrawal, removed the International as a Respondent herein. I deferred ruling on the motion of Charging Parties to withdraw the remaining portions of the charge pending my hearing the record testimony and consideration of the parties briefs on this issue.

business at 1418 Willow Avenue in Hoboken, New Jersey, herein called the Hoboken facility, at 2945 Richmond Terrace in Staten Island, New York, herein called the Staten Island facility, and various other places of business in New York and New Jersey. Annually, Respondent Employer in the course of its business operations, performed services in excess of $50,000 for various steamship companies, including United States Lines and Prudential Lines, each of which companies annually derives gross revenues in excess of $50,000 from the transportation of goods and passengers among the several states of the United States and to foreign countries. Respondents admit and I find that Jackson is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted and I so find that Charging Parties and the ILA are, and have been at all times material herein labor organizations within the meaning of Section 2(5) of the Act.

II. Facts

A. Recognition of ILA By Jackson and Arrangement For Payments to ILA Officers By Jackson

Respondent Employer began its operations in 1948. Prior to 1975 its employees were not represented by any labor organization. Nicholas Seregos, herein called Seregos, became president of Jackson on or about August 1971, when it had sales of less than $500,000 per year.

In the middle of 1975, Seregos noticed that when he would go around soliciting for business, particularly on U.S. flag ships, he would be told that unless he was a Union shop his firm could not obtain the work on the piers. Sonny Montella, an acquaintance of Seregos, suggested to him that he contact Anthony

Anastasio, an officer of the ILA.[3] Seregos then telephoned Anastasio at the ILA's office and informed Anastasio of his being referred by Montella to Anastasio. Seregos added that he was looking for some business and was interested in unionizing the shop. A meeting was arranged for and held either at the Respondent Employer's Hoboken shop or Respondent Union's Brooklyn office. Seregos repeated that he was looking for work and wanted to unionize his shop. Anastasio responded that he wished to meet the employees at the shop and see if they would be willing to sign up. Anastasio then met with Jackson's employees. The record does not disclose what if anything Anastasio said to the employees at that time.

Seregos next met with Anastasio sometime prior to July 11, 1975. At this meeting Anastasio offered to obtain some business for Jackson, for a consideration of 10% of the proceeds of any business obtained through his efforts. Anastasio made it clear to Seregos that he would not help Seregos get any business unless Jackson became a Union shop. Seregos agreed to the arrangement and agreed that his firm would become a Union shop.

On or about July 11, 1975, Seregos met again with Anastasio, this time in the ILA's office. At this meeting Anastasio instructed Seregos to write a letter to Prudential Lines, a U.S. flag ship, attention John Marano. Anastasio told Seregos that he could help him obtain business from this firm. Pursuant to Anastasio's instructions Seregos wrote a letter dated July 11, 1975 to Marano of Prudential, stating that Jackson is a complete union plant affiliated with ILA, and that its employees are ILA members.

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[3] At that time Anastasio was Secretary Treasurer of Local 1277, ILA. In March 1978, Local 1277 as well as other locals of the International merged into Local 1814, ILA, the Respondent Union herein. All parties concede that Respondent Union is the successor to Local 1277. As Secretary Treasurer, Anastasio was responsible for the administration of contracts for the ILA in the ship repair industry. He continued exercising that responsibility after the merger when he became Executive Vice President, the number two position in the merged organization.

On September 15, 1975 the ILA obtained authorization cards from Jackson's employees and in late September, Jackson by Seregos signed a memorandum of understanding with the ILA, apparently agreeing to recognition. Thereafter pursuant to checkoff authorizations executed by Jackson's employees, it began to checkoff dues and forward them to the ILA.[4]

Sometime in the fall of 1975, Seregos met with Anastasio and Anthony Scotto, president of the ILA, at the ILA's office. Seregos indicated that he was looking for more work. Scotto replied that he could help Seregos obtain the United States Shipping Lines account. The conversation then drifted to how Seregos was going to come up with the 10% commission arrangement on this business. Scotto indicated that he was concerned about how Seregos was going to get the money and suggested that he would assist Seregos in setting up a foreign corporation to help him in this regard. Seregos replied that this will not be necessary.

The parties then signed a collective agreement effective November 3, 1975 to November 3, 1978. This contract was the industry contract, known as the "blue book," and was signed by Seregos, Anastasio and Scotto.

At some point in the early fall of 1975, Seregos received a phone call from a Mr. Bauer, assistant to the director at U.S. Lines, notifying Jackson to start work on one of their ships. Jackson began receiving business from Prudential Lines in or about September of 1975.

At some time late 1975, after Jackson began receiving business from Prudential and U.S. Lines, Seregos discussed with Anastasio the method of payment of the 10% commission. Anastasio informed Seregos that payments were to be made in cash, and Seregos agreed.

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[4] The memorandum of understanding signed by Jackson was not introduced into the record, nor does the record reveal its terms. However, the record tends to suggest and I so find that the memorandum of understanding in addition to providing for recognition of ILA, also called for Jackson to be bound by the terms of the ILA's industry contract, including checkoff provisions, which was about to expire.

In early 1976 Seregos began his payments to Anastasio, which were made in cash at the ILA's office with no else present. Pursuant to the arrangement made, Seregos paid Anastasio $15,000 during the course of 1976 covering 10% of the business obtained by Jackson from Prudential and U.S. Lines. During the year 1977, Seregos paid to Anastasio, $5,000 on June 2, $1,000 on October 6, $5,000 on November 17, and $5,000 on December 19. All of these payments, representing 10% of business Jackson obtained from U.S. and Prudential, were also made to Anastasio by Seregos at the ILA office.

In 1978, Jackson lost the Prudential account. Seregos complained to Anastasio about it and asked if there was anything he could do to reinstate the business. The record does not reflect Anastasio's response, but the business was not thereafter restored.

During the year 1978, payments were made in the same fashion, but only covering Jackson's business from U.S. Lines. Seregos gave Anastasio pursuant to their arrangement, $5,000 on February 28, $5,000 on March 23, $5,000 on April 10, $5,000 on May 15, $3,700 on July 3, and $5,000 on November 15.

During this period of time Seregos met with Anastasio on various union matters, as Anastasio was directly responsible for the administration of the collective bargaining agreement with Jackson.

In early May 1979, at Anastasio's office, Anastasio asked Seregos if there was any money due "against the work." Seregos responded why now in view of the investigation. Anastasio replied that it was all right.[3]

On May 8, 1979 Seregos paid Anastasio $4,000, again at the ILA's office.

Shortly thereafter, by telephone Anastasio asked Seregos if he could make a contribution for the purpose of helping Scotto

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[3] The "investigation" referred to by Seregos was apparently the criminal investigation which culminated in eventual indictments and convictions of Anastasio and Scotto discussed more fully *infra*.

pay his attorney's fees. Seregos replied that it was rather difficult at that time to come up with any money. Anastasio asked him to try, and informed Seregos that they are having an affair at a hotel and were asking others in the industry to contribute to pay Scotto's attorney fees. Subsequently, Seregos obtained $4,000 in cash and gave it to Anastasio at ILA office on July 5, 1979.

During the period between 1975 and 1979 Jackson's business as well as its number of employees and ILA members grew substantially.

On November 3, 1978 Jackson and the ILA entered into a renewal of the prior contract, with a number of changes included therein, running from November 3, 1978 to November 2, 1981. This contract was executed by Anastasio and Joseph Collazzo for the ILA and by Seregos on behalf of Jackson.[6]

In January 1979, an indictment was handed down in the Southern District of New York by the Grand Jury pertaining to the receipt of certain payments by Anastasio and Scotto from certain employers under contract to ILA, not including Jackson.

On July 31, 1979 a superseding indictment was filed adding additional counts of such conduct by Anastasio and Scotto, including payments made by Seregos to Anastasio from 1977-1979. Scotto was not indicted for any dealings with Seregos or Jackson.

Shortly after the filing of the superseding indictment, the ILA upon recommendation of its attorney immediately removed Anastasio from participation in any dealings or negotiations with Jackson. The ILA also insisted upon and Jackson agreed that Seregos be removed from any dealings or negotiations with the ILA.

Anastasio was permitted by the ILA to remain as its Executive Vice President and Scotto was allowed to remain as president.

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[6] This contract as well as the prior contract was negotiated and signed by eleven employers in the industry, including Jackson.

Scotto and Anastasio were tried in Federal Court in New York, on multiple counts of receiving unlawful labor payments in violation of Section 302 of the Taft Hartley Act, 29 USC Section 186(b), as well as conspiring to participate in the affairs of the ILA through a pattern of racketeering activity, and for failure to report and pay federal income taxes on the unlawful amounts obtained from such activities.

After an eight week trial, both Scotto and Anastasio were convicted in January 1980, of forty three counts under the indictment and the jury was unable to reach a verdict on seventeen other counts included therein.[7] Anastasio was convicted of receiving unlawful payments from Seregos and Jackson for a period of February 28, 1978 to July 5, 1979. Scotto as noted was not indicted nor convicted of the receipt of any payments from Seregos or Jackson. Anastasio was sentenced to two years in prison, five years probation and a $5,000 fine. Scotto was sentenced to five years in prision, with five years probation and $75,000 in fines.

The sentencing occurred in February 1980, and it also included any order by the trial court judge that Anastasio and Scotto forfeit their Union offices. The convictions were appealed to the 2nd Circuit Court of Appeals. On September 2, 1980, a three judge panel unanimously affirmed the convictions of Anastasio and Scotto. The Court in its decision found as follows. "Nicholas Seregos of Jackson Engineering Co., Inc. an ILA-affiliated marine engineering company doing general ship repair, paid Anastasio a 10% "commission" on business obtained for his company with Scotto's and Anastasio's assistance from Prudential Lines, Inc. and United States Lines."

Anastasio and Scotto subsequently petitioned the Circuit en banc for a re-hearing. At some point undisclosed by this record, such request was denied.

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[7] Seregos testified for the prosecution under a grant of immunity. Anastasio did not take the witness stand. Scotto did testify and denied knowledge of any 10% commission arrangement with Seregos.

Meanwhile, shortly after the conviction, an action was brought by Scotto and Anastasio in the New York State Supreme Court for a declaratory judgment that the term "conviction" under the New York and New Jersey Waterfront Compact, means after all appeals are exhausted.[8] The Waterfront Commission moved for judgment in its favor claiming that "conviction" under the statue applies to the date of sentencing. The Supreme Court rules in favor of the Commission in September 1980, and directed that Anastasio and Scotto be removed from office. Upon application, the Appellate Division stayed the order of the Court, pending an expedited appeal from the Court's judgment. Said appeal was filed and in late October 1980, the Appellate Division unanimously affirmed the decision of the Supreme Court. The record does not disclose whether or not any appeal was filed from this decision to the New York State Court of Appeals.

The record does disclose however that the ILA permitted Anastasio and Scotto to remain as officers of the ILA until the exhaustion of their appeals from these various proceedings. New elections were conducted by the ILA in May 1981, and new individuals were elected to fill the positions previously held by Scotto and Anastasio.

Portions of the testimony given by Seregos in the Federal Court trial were stipulated into evidence by the parties and forms the basis for my findings set forth above with respect to Seregos' dealings with Anastasio and Scotto. The portions of his testimony included in this record are sketchy and somewhat unclear in certain areas, and my findings set forth herein are based on what I perceive to be a fair reading of such testimony.

The parties are in substantial agreement as to the above facts with the exception of one area. Respondents assert that the record establishes that the unlawful arrangement between Seregos and Anastasio was entered into after the ILA organized

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[8] Under the Waterfront Compact Act, a Waterfront Commission was established to regulate and control the affairs of longshoremen and labor organizations representing such workers in New York and New Jersey. The Act provides that upon conviction of a crime, any officer of such a labor organization must be removed.

Jackson's employees and after the memorandum of understanding and/or contract was executed by the parties in September and November 1975. Although Seregos' testimony is particularly uncertain on this subject, I am persuaded that my findings set forth above, accurately reflect his testimony and a reasonable conclusion as to the true facts.

Respondent Union points to Seregos' testimony that Anastasio after having been approached by Seregos about his becoming a Union shop, insisted upon speaking to Jackson's employees to see if they wished to sign up. Such a meeting did occur according to Seregos, and Respondent Union argues that this meeting must have been in September when the authorization and checkoff cards were executed by Jackson employees. Thus, it is argued since Seregos testified that the arrangement for payments was made after Anastasio met with his employees, that perforce the arrangement was not made until the contract or at least the memorandum of understanding was signed.

I do not agree with this analysis of Seregos' testimony however, and believe that General Counsel's position that the arrangement was agreed to prior to the execution of the memorandum and contract, more accurately reflects Seregos' testimony as well as the record evidence. I note that with respect to the meeting held by Anastasio with Jackson employees after his initial conversation with Seregos, there is no record testimony as to what was said therein, and in fact Seregos indicated that no materials were distributed by Anastasio to his employees at that time. More significantly, Seregos sent a letter to Prudential dated July 11, 1975, which was received by Prudential on July 15,[9] asserting that Jackson was an ILA shop and requesting business. This letter was sent pursuant to the instructions of Anastasio, and was sent two months prior to the execution of any contract or memorandum. Since Anastasio

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[9] Although Seregos in direct testimony was unsure of when he mailed the letter to Prudential and suggested the possibility that the letter may have been backdated, when confronted on cross examination by the original letter with a Prudential date stamp reading July 15, he recalled that it was sent in July and that he had orally agreed to recognize the Union prior to sending such letter.

made it clear to Seregos that he would not refer Jackson any business unless it became an ILA shop, I find that he would not have suggested a letter to Prudential unless he had a committment from Seregos to become a Union shop.

Therefore, I am convinced that Seregos and Anastasio entered into their agreement for the 10% commission payment for business referred in July, at least two months before any memorandum contract was executed or any authorization cards obtained. At the same time as noted, I find that Seregos orally agreed with Anastasio that he would become an ILA shop.

B. Jackson's Acquisition of the Staten Island Facility

Jackson has been made and is engaged in the business of major shop repairs, overhauls and renovations, both at its own and leased locations, as well as at sites where vessels are docked and berthed. Jackson owned and operated a machine shop in Hoboken, New Jersey, and leased facilities at Columbia Street and Pier 12 on the Brooklyn, New York waterfront, alongside of which were berthed vessels worked upon by its employees. Jackson's employees also would travel to make ship repairs upon vessels tied up at other parts along the coast.

This type of operation that Jackson was engaged in was known in the industry as a pierside operation, as contrasted with drydock work[10] operations, which repair ships at their own facilities or shipyards.

In both types of ship repair operations, the fluctuation in employee complements is quite substantial with employment frequently sporadic depending upon what jobs are obtained by the Employers at any particular time. Respondent in early spring of 1979 employed some 140 employees in the bargaining unit. During the months of June through September 1979, Respondent employed between 40 and 76 employees at various times.

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[10] A drydock is like an elevator which lifts a ship out of the water so that work can be performed on portions of the ship which would normally be below the waterline.

Sometime in the winter of 1978, Jackson began negotiating with Brewer Drydock Co., herein called Brewer, for the purchase of a drydock facility operated by Brewer at Richmond Terrace in Staten Island, New York, right across the bay from Jackson's Brooklyn facilities. Jackson was interested in purchasing this facility, primarily because it would then be able to perform what is known as "bottomside" work, which can only be done with a drydock. Since many jobs in the industry require a Company to bid on both "bottomside" and "topside" jobs (called "combination" jobs), Jackson hoped to expand its business by purchasing a facility which included a drydock. In addition, Jackson's facilities at the Brooklyn pier were rented on a month-to-month basis and were subject to cancellation at any time. The negotiations with Brewer continued on and off throughout the first 4-5 months of 1979. Sometime in April or May, Jackson reached tentative agreement with Brewer for the purchase of the yard, with a few details and fine points to be narrowed down. Sometime in May, Seregos and Milton Horowitz, Vice President of Jackson spoke to Anastasio and Joseph Callazzo of the ILA. They informed the Union officials that they were going to buy a shipyard and wanted to negotiate a modification of the parties existing agreement. One of the ILA officials replied that there was nothing to talk about until Jackson actually purchased the new facility.

In early June the agreement was consumated and the closing held, with a purchase price of $2,400,000.00 for the State Island facility of Brewer, with Jackson to take over the premises on June 5.

C. Jackson Rehabilitates The Staten Island Facility and IUMSWA Asserts Its Claims

Brewer's employees at the Staten Island shipyard, had been represented for collective bargaining by IUMSWA since a Board certification on July 25, 1975. The last collective bargaining agreement between Brewer and IUMSWA ran from September 27, 1978 to August 31, 1981. The contract contains a clause which reads that the agreement shall be binding upon Brewer and its successors and assigns.

Throughout the spring months, Brewer wound down its operations and gradually laid off its work force. By June 5, all of Brewer's employees had been laid off.

On May 29, IUMSWA wrote a letter to Brewer indicating its knowledge of a pending sale, requests the name of the potential buyer, and that Brewer notify the purchaser that IUMSWA intends to enforce its successor clause in the contract and assert its right as exclusive bargaining agent for the work location as certified by the National Labor Relations Board in accordance with the recognition clause of the contract. The record does not disclose whether this letter was ever forwarded to Jackson, nor whether Brewer ever notified Jackson officials of IUMSWA's claims.

However, during the next several months (between June and September), various officials of IUMSWA met and/or spoke on the phone with various officials of Jackson, and asserted IUMSWA's "jurisdictional" bargaining rights at the Staten Island facility, and/or rights under the successor and assigns clause of its contract with Brewer. Additionally, the IUMSWA officials requested that Jackson hire the former employees who were now out of work.

At no time did any IUMSWA ever make any claim that it represented any of Jackson's employees.

Indeed during this period of time between June and early September, Jackson was not engaged in any ship repair activities at the Staten Island yard. During these months, Jackson was engaged in rehabilitating the facility to make it ready to accommodate Jackson's ship repair operations. This consisted of repairing, changing and renovating the facility, plus constructing housing and meal facilities for Naval personnel, to be used while Naval vessels were being refitted.

Vincent Klusmyer, Jackson's General Manager at the Staten Island facility was in charge of the rehabilitation, and to that end he employed a number of outside subcontractors to perform this work. In addition, Waterfront Marine, an affiliate of Jackson, controlled by Seregos, employed 10-12 individuals to maintain

and guard the shipyard. These individuals were all formerly employed by Brewer. All but one of these individuals had been previously employed by Brewer in supervisory or non-unit positions, such as dock master, assistant dock master, maintenance foreman and estimator. One employee, J. Boschi who had been an electrician at Brewer, was performing electrical maintenance tasks during the summer months while the yard was being rehabilitated.

During this period of time there was no ship repair work being performed at the Staten Island facility. Jackson continued its business at the Brooklyn piers as well as its Hoboken machine shop with as noted, an employee complement fluctuating between 40 and 76, during these months.

D. Modification of The Existing Jackson ILA Contract

In late June or early July, and through the summer months, ILA and Jackson representatives met to discuss modification of the existing contract.[11]

Jackson requested that its existing contract be modified in view of its purchase of the Staten Island facility. Jackson argued that the ability to bid on "combination" jobs would result in more regularity of employment of work for its employees, thereby making up for any loss in contractual benefits. In addition, rates for shipyard firms are traditionally lower in the industry than for pierside operations, and Jackson to be competitive with its competition, needed lower labor costs. Moreover, the costs of maintaining a shipyard are considerably higher than of a pierside operation. The ILA agreed to discuss such a modification but only if they were convinced that more regularity of employment would ensue.

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[11] Present for Jackson were Klusmyer, Horowitz and its attorney, Martin Seham. For the ILA its attornies Howard Schulman and Robert Bogucki, business agent Collazzo, and various employee committee members attended these bargaining sessions.

To this end the parties reviewed and compared the contracts of various shipyards, including the contract between IUMSWA and Brewer. The contracts of the shipyard firms were lower with respect to wages and benefits than the existing contract between ILA and Jackson.

After a number of bargaining sessions, with numerous proposals being presented by both sides, an agreement was reached, on or about September 5. The agreement was then prepared by ILA representatives and executed by the parties on September 13, retroactive to September 5.

The agreement modified the recognition clause to include the Staten Island facility.[12] Recognizing the fact that some employees of Jackson would still be performing some work outside the Staten Island facility at various piers, even with the acquisition of the new yard, the parties agreed that the 25 most senior employees who would be most likely to perform such work,[13] would receive no reduction in their wages or benefits.

With respect to the remaining employees, the parties agreed that in view of the expected increase in regularity of employment for them, that they would receive slight reductions in wages, pension and hospitalization contributions. Other benefits such as holidays, sick days and jury duty were not modified for any employees.[14]

During the course of these sessions, Jackson informed the ILA that it intended to give preference in employment at the Staten Island facility to employees currently employed at Ho-

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[12] The prior agreement makes no specific mention of any facilities of the Employers involved. It merely provides for recognition of various classifications of employees "employed by the employer."

[13] These more experienced employees were capable of working without supervision, so were therefore more apt to be assigned to outside piers where there were no Jackson supervisors present.

[14] The modification also changed the duration of the prior agreement, as the agreement as modified runs from September 5, 1979 to September 4, 1982, with reopening provided for, 30-60 days prior to September 5, 1980 and September 5, 1981. The modified contract also contained a union security clause as did the prior agreement.

boken and at the Brooklyn piers as well as to employees on layoff status from these facilities.[15]

There was no discussion of the jurisdictional and successorship clause asserted by IUMSWA during any of these sessions. As noted the IUMSWA contract with Brewer was referred to constantly during these meetings. There is no question that Jackson never had any doubt that it would recognize the ILA as the representative of its employees at the Staten Island facility, as it believed that it was obligated to do.[16]

E. Jackson Begins Ship Repair Operations at the Staten Island Facility

On September 5, 1979, Jackson began ship repair operations at the Staten Island yard. In its first week of such operations, Jackson employed 51 bargaining unit employees. Of these employees, 48 were transferred over from its Brooklyn or Hoboken facilities.[17]

Jackson also employed two individuals who were formerly employed by Brewer,[18] and one individual who was neither a former Brewer employee nor a Jackson transferee.

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[15] In this connection, Jackson maintained a file of 300-400 W-4 forms, consisting of names and addresses of its employees who have worked for Jackson in past years, which it uses whenever it needs to hire additional employees.

[16] When asked if he informed the ILA that IUMSWA had asserted any claims with respect to the facility, Horowitz responded, "No sir. I felt we had a union already. We had a union."

[17] As noted, Jackson closed down its operations at the Brooklyn piers, where it had previously rented facilities from the Port Authority. It continued to operate its Hoboken machine shop while continuing to operate the Staten Island yard. The record is not clear as to how many of the Hoboken employees were transferred over to Staten Island, although it does appear that the bulk of the employees who were sent to Staten Island were formerly employed at the Brooklyn piers.

[18] One of these individuals was J. Boschi, an electrician, who had been employed by Waterfront Marine during the rehabilitation period from June through September. He performed essentially the same work (electrical maintenance functions), during the rehabilitation period as he did after ship repair operations began on September 5. The other former Brewer employee, E. Gamboa, was employed as a Crane Operator.

Jackson also employed 10-11 former Brewer supervisors and non-unit personnel, into various supervisory positions at the Staten Island yard.

During its next week of operation, the payroll period ending September 16, 1979, Jackson employed 55 employees, 46 pre-existing Jackson employees, two former Brewer employees,[19] and seven employees from neither group.

On or about September 20, Jackson acquired a new contract to repair a vessel called the Waterford. This job required a deadline to be met, and necessitated the hiring of a substantial number of additional employees. In this connection, Jackson after exhausting its list of laid off Jackson employees, hired most of these additional employees from a group of some 500 employment applications and resumes that it had on file. These applications and resumes resulted from newspaper advertisements Jackson had placed in various newspapers, as well as from word of mouth sources. Included in these applications and resumes in Jackson's files at that time, were 100 applications from former Brewer bargaining unit employees.

By October 25, 1979, by which time Jackson was utilizing drydocks at the Staten Island facility, it employed 151 bargaining unit employees. Included among these employees were 49 employees who had been in the Jackson ILA bargaining unit, 23 former Brewer employees, who had been included in the IUMSWA unit, and 79 employees from neither category of employees.

Prior to its acquisition of the shipyard, the number of "regular" or "steady"[20] employees in the Jackson bargaining unit fluctuated between 50 and 70 employees. As of June 1981, the

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[19] Again Boschi and Gamboa.

[20] A "regular" or "steady" employee is defined as an employee who works 4-5 days a week for 2/3 of the year.

number of such regular employees of Jackson fluctuated from 100 to 135.[21]

Of the four contractual job classifications included in the parties modified contract, employees were hired by Jackson in each classification when the yard opened on September 5.

Prior to its acquisition of the Staten Island yard, Jackson employed employees who performed work requiring 14 of the 16 trade skills that were eventually to be required when it became fully operational. The two new skills were dockhand and crane operator.[22]

On the payroll week ending September 9 and 16, Jackson employed one crane operator and no dockhands. On the week ending October 25, Jackson employed 3 crane operators and 3 dockhands.[23]

With the exception of the dockhand and crane operator functions, the work performance by Jackson's employees before and after the acquisition of the shipyard was essentially identical. The only meaningful difference between the two operations is the use of the drydock, which as noted requires use of dockhands to lift the vessel out of the water, and enables Jackson to now perform bottomside work. However, the actual ship repair work performed by Jackson employees on bottomside work is no different than that performed on topside work. The skills required are the same, and no additional training is required to enable an employee who is able to perform topside work to perform bottomside work. Jackson's employees work inter-

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[21] The above findings are derived from the credited testimony of Michael Porta, Jr., a Local 1814 delegate, who testified as to these figures based upon his observations in servicing the shop, consisting of visits on the average of twice a week from the time the shipyard opened until the date of his testimony, herein on June 4, 1981.

[22] Dockhands were not needed at Jackson's prior operations, since it did not operate a drydock. Crane operators had been utilized previously by Jackson, but were supplied by the leasor of the crane that Jackson had rented.

[23] Two of the three dockhands hired by Jackson were former Brewer employees from the IUMSWA bargaining unit.

changeably on "top" and "bottom" work there being no such thing as a topside or bottomside crew. Shipyards (Brewer prior to September and Jackson after September) and pierside operations (Jackson prior to September) perform the same work and hire from the same source of workers, and shipyard or pierside experience are equally significant in terms of hiring qualifications for hire in either type of operation.

As noted above, the primary reason motivating Jackson to purchase the Staten Island yard from Brewer was the fact that the yard included a drydock which enabled Jackson to bid on combination (top and bottom) jobs. Since its commencement of operations at the shipyard, about 30% of Jackson's business includes such combination bids. Of such jobs, acquired as a result of combination bids, 30% of such work includes bottomside repairs. Thus, bottomside work comprises approximately 9% of the work being performed by Jackson employees, since their acquisition of the shipyard and their use of the drydock.

F. IUMSWA Files ULP and Article XX Charges

On September 28, 1979, IUMSWA filed unfair labor practice charges against Jackson and the ILA alleging in addition to the 8(a)(2) and 8(b)(1)(A) and (2) *Midwest Piping* allegations contained in the instant complaint, that Jackson violated Section 8(a)(5) of the Act by refusing to recognize IUMSWA as the successor to Brewer's bargaining obligation, and Section 8(a)(3) of the Act by discriminatorily refusing to hire former Brewer employees because of their IUMSWA membership, and that ILA violated Section 8(b)(1)(A) and (2) by causing Jackson to refuse to hire such employees.

On December 14, the Regional Director dismissed the 8(a)(5) portions of the charges in a letter reading as follows:

> Gentlemen:
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> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

The investigation did not establish that Jackson Engineering Co., hereinafter referred to as Jackson, violated Section 8(a)(5) of the Act by refusing to recognize and bargain with Industrial Union of Marine and Shipbuilding Workers of America, Local 17, hereinafter referred to as Local 17, as the collective bargaining agent of its employees employed at the former Brewer Dry Dock Company, hereinafter referred to as Brewer, facility at 2945 Richmond Terrace, Staten Island. Rather the evidence disclosed that in June 1979, Jackson purchased that facility from Brewer to replace and supplant Jackson's former ship repair facility located in Brooklyn, New York, and that in September 1979, after performing certain maintenance and make-ready work on the facility, Jackson closed its Brooklyn facility, relocating to the former Brewer yard in Staten Island, and taking with it its work force from the Brooklyn facility.

Prior to transferring title to the Staten Island facility to Jackson, Brewer laid off or terminated all of its production and maintenance employees, such employees having been represented for collective bargaining purposes by Local 17.

While the investigation disclosed that Jackson continues to use the facility for the same purpose which Brewer operated it; the repair and maintenance of ships and other vessels; that Jackson (as did Brewer) classifies all of its production and maintenance employees in a single unit; that there was not a significant hiatus in the operation of the Richmond Terrace Shipyard; and that Jackson has hired some of the employees formerly employed by Brewer since it commenced operations at the shipyard, nevertheless, it does not appear that Jackson has purchased any of the goodwill of Brewer or assumed any of its liabilities or other assets, or that a majority of Jackson's present complement of employees at the Richmond Terrace facility are former Brewer employees.

> In these circumstances, the evidence is insufficient to establish that Jackson is a successor to Brewer and was therefore under an obligation to continue to recognize and bargain with you as the collective bargaining representative of the employees employed at the Richmond Terrace shipyard. I am therefore refusing to issue a complaint on the allegation of your charge which alleges that Jackson violated Section 8(a)(5) of the Act. Other allegations of your charge are being processed further.

The Regional Director also refused to issue complaint with respect to tl. 8(a)(3) and 8(b)(1)(A) and (2) allegations pertaining to Jackson's refusal to hire employees because of their IUMSWA membership.[24]

IUMSWA appealed the Director's partial refusal to issue complaint with respect to the 8(a)(5) successorship allegations. On February 11, 1980, the Acting Director of Appeals upheld the Director's refusal to issue complaint on these allegations, agreeing with the Director that Jackson was not a successor to Brewer's collective bargaining obligation to IUMSWA.

On October 5, 1979 IUMSWA filed charges under Article XX of the AFL-CIO constitution complaining that ILA has violated Sections 2 and 3 of such article by allegedly failing to respect an established collective bargaining relationship and work relationship maintained by IUMSWA at the Richmond Terrace shipyard.

On October 12, 1979 ILA filed similar charges against IUMSWA, alleging additionally that IUMSWA violated Section 20 of Article 20 by resorting to the NLRB to determine the dispute. A hearing was subsequently held on February 6, 1980 on the matter before Impartial Umpire D. Q. Mills.[25]

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[24] The record does not reflect whether these portions of the charges were withdrawn or dismissed.

[25] A hearing had been held on November 8, 1979 before Umpire Kleeb. However, Kleeb passed away prior to rendering his decision and a new hearing was conducted.

At this hearing representatives of IUMSWA and ILA as well as their respective attorneys participated, called witnesses and were given the opportunity to and did present arguments and positions. On February 20, 1980 Impartial Umpire Mills issued his decision, referred to as "Determination." He found that ILA has not violated either Section 2 or 3 of Article XX, since the standards under Article XX for the survival of IUMSWA's collective bargaining agreement relationship have not been met, and that ILA has not by exercise of collusion or economic pressure—sought to obtain work for its members as to which another affiliate has an established work relationship.

The Umpire also found that IUMSWA has violated Section 2 and 20 of Article XX, by interfering with ILA's established collective bargaining relationship as to the employees in dispute, in its efforts to represent these employees and resort to the NLRB to determine the dispute.

IUMSWA subsequently filed an appeal from Umpire Mills' determination, which was heard before a subcommittee of the AFL-CIO Executive Council. By letter dated May 21, 1980 from Lane Kirkland, President of the AFL-CIO, the appeal was disallowed and the determination of the Impartial Umpire was ordered to go into full force and effect.

On June 3, 1980, Michael Brodie, Esq., attorney for Charging Party wrote a letter to the Director for 29, referring to the above described Determination and disallowance of IUMSWA's appeal. The letter then stated, "pursuant to the enclosed documents and as a result of their issuance, my client hereby requests that the charges and amended charges in the above proceedings be withdrawn."[26]

On October 1, 1980, Regional Director Kaynard sent a letter to Brodie, denying his request to withdraw, except as noted with respect to the charges against the International of the ILA. Director Kaynard's letter is set forth below:

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[26] The above proceedings refer to the instant charge and complaint.

Dear Mr. Brodie:

Your letter requesting withdrawal of the unfair labor practice charges in the above-captioned cases has been carefully considered. For the reasons stated below, you are hereby advised that your request to withdraw the charge in Case No. 29-CA-7498 is denied, and that your request to withdraw the charge in Case No. 29-CB-3966 is approved only insofar as it relates to the International Longshoremen's Association, AFL-CIO, but is denied insofar as it relates to Local 1814, International Longshoremen's Association, AFL-CIO.

As you know, the investigation of these charges disclosed evidence of serious violations of the National Labor Relations Act by Jackson Engineering Co. and by Local 1814, AFL-CIO, including concealed payments made by Jackson to Anthony Scotto and Anthony Anastasio, the president and executive vice president of Local 1814, ILA, AFL-CIO, respectively, commencing in 1975 pursuant to an unlawful arrangement between Jackson and Local 1814, all of which are alleged in the Consolidated Complaint which I issued in these cases on May 30, 1980. Although you advise that an Impartial Umpire has determined that your clients, the charging parties in these cases, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and Local 17, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO violated Article XX of the AFL-CIO Constitution by resorting to the Board's processes to resolve your dispute with Jackson and Local 1814, ILA, and that the Executive Council of the AFL-CIO has upheld this ruling by the Impartial Umpire and has directed you to request withdrawal of these charges, I have nevertheless concluded that there exists an overriding public interest to be served by the continued processing of these cases insofar as they relate to the unfair labor practices which were engaged in by Jackson Engineering Co. and Local

> 1814, ILA, AFL-CIO, as alleged in the Consolidated Complaint issued on May 30, 1980. I do not believe, therefore, that it would effectuate the policies of the National Labor Relations Act to approve your request to withdraw the charges against these Respondents in these cases. Accordingly, that request is hereby denied.
>
> On the other hand, upon reconsideration of the allegations of the Consolidated Complaint insofar as they relate to International Longshoremen's Association, AFL-CIO, I have concluded that the investigation has disclosed no evidence that this Respondent has engaged in any of the unlawful conduct alleged in the Consolidated Complaint issued on May 30, 1980. Your request to withdraw the charge in Case No. 29-CB-3966 insofar as it related to the International Longshoremen's Association, AFL-CIO is therefore hereby approved.

As noted above, IUMSWA's attorney renewed its request to withdraw to the Chief Administrative Law Judge, which was in turn referred to me for disposition.

As a result of the Article XX proceedings set forth above, Local 17 of IUMSWA was dissolved and became defunct.[27]

III. Analysis

A. The Article XX Proceedings and IUMSWA's Request to Withdraw

Respondents contend that the instant complaint should be dismissed based on the fact that the Article XX proceeding, wherein IUMSWA fully participated, resolved any possible question concerning representation of Jackson's employees at the Staten Island yard. Moreover, they urge that IUMSWA's

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[27] Brewer was the only employer with whom Local 17 of IUMSWA had a collective bargaining agreement or relationship.

withdrawal request, based upon said Article XX proceeding should be approved, thereby also mandating the dismissal of the instant complaint.

General Counsel argues that the Board enforces public and not private rights, and that particularly questions concerning representation rights should not be deferred to other tribunals. Thus, it is contended that no affect should be given to the Article XX proceeding insofar as it attempts to resolve the alleged question concerning representation herein, or as a predicate for the approval of IUMSWA's request to withdraw the charges and consequent dismissal of the complaint herein.

The instant complaint contains essentially two separate and distinct allegations, which in my judgment require separate consideration for the purposes of assessing these contentions.

Dealing first with the allegations of concealed payments, the complaint alleges that on various dates between 1975 and 1979, Jackson by Seregos, made such payments to Anastasio and Scotto as agents of ILA, in violation of Sections 8(a)(1) and (2) and 8(b)(1)(A) of the Act. It is clear that these allegations were not brought up, considered nor dealt with during the Article XX proceeding. Thus no basis exists for deferring or dismissing this aspect of the complaint based on the Article XX decision.

However, IUMSWA has as a result of such proceeding requested withdrawal of the charges it has filed, said charges of course forming the predicate for the instant complaint. Although the Regional Director has denied the Charging Parties request to withdraw, an Administrative Law Judge has the discretionary authority to approve such requests made before him, even where General Counsel objects.[28] Thus, it becomes necessary for me to determine whether the public interest and the purposes and policies of the Act would be served or vindicated by approval of the withdrawal request herein.

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[28] *Alberici Fruin-Colnon*, 226 NLRB 1315, 1316 (1976); *Local 638, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Roland Tompkins Inc.)*, 158 NLRB 1747, 1750 (1966).

Respondents argue that since Anastasio and Scotto have both been convicted criminally, sentenced and removed from Union office, no useful purpose would be served by continuing this phase of the litigation, and that a cease and desist order would be duplicative, superfluous and wasteful of agency resources. They also point out that Anastasio, Scotto and Seregos were immediately removed from any dealings and negotiations between Jackson and the ILA immediately upon the superseding indictments being issued.

The Regional Director in his letter denying the request to withdraw the charges, characterized the concealed payments herein as "serious" violations of the Act and concluded that there "exists an overriding public interest to be served" by the continued processing of these charges. I agree. I do not subscribe to Respondents' contentions that the criminal convictions of Anastasio and Scotto and their subsequent removal from Union office,[29] obviates the need for any further proceedings herein.

The criminal proceedings did not resolve nor did it purport to decide the issue under consideration herein, i.e., whether the ILA and/or Jackson are responsible for the conduct of its officers of making and receiving concealed payments pursuant to an unlawful arrangement over a four to five year period. It seems to me that the employees of Jackson, and the membership of the ILA are entitled to a clear and unequivocal statement by the posting of a Notice, signed by its representatives, that Jackson and the ILA do not, and will not countenance such behavior on the part of its officers and agents.[30]

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[29] I note in this connection that the record does not establish whether Seregos has been removed as an officer of Jackson.

[30] In this connection, the action of the ILA and Jackson of removing Seregos, Anastasio and Scotto from any dealings with each other with respect to matters involving collective bargaining, falls far short of giving such assurances to its employees and/or its members. I note that the ILA continued to permit Anastasio and Scotto to remain as officers of the Union, even after they were convicted of accepting such payments, as well as other criminal conduct, notwithstanding orders of two lower Courts to remove them, until finally all appeals were exhausted.

Therefore, I conclude that the public interest and the purposes of the Act will not be served by approval of the withdrawal request with respect to the concealed payments allegations in the complaint herein, and I shall deny IUMSWA's request to do so.

The other portion of the complaint herein, the *Midwest Piping*[31] allegations, dealing with Jackson's signing a modification of its contract with the ILA extending coverage to its employees at the Staten Island yard, presents a more troublesome issue insofar as it relates to the withdrawal request.[32]

The *Midwest Piping* allegations herein are based upon the alleged existence of a real question concerning representation, by virtue of certain claims made by IUMSWA prior to the execution of the September 1979 modification contract by ILA and Jackson covering the latter's employees at the Staten Island yard. As pointed out, quite persuasively by Respondents, IUMSWA has now sought to withdraw its charges herein, thereby eliminating any current question concerning representation, real or otherwise, for these employees. Even more significantly, Local 17 or IUMSWA has been dissolved and is now defunct. Thus, any election that might be ordered as a result of an 8(a)(2) finding herein, would not include IUMSWA, and employees would not be able to choose between IUMSWA or ILA as their representative. Therefore it is questionable whether this phase of the litigation should be pursued further, particularly in an area such as *Midwest Piping*, where the Board had been re-

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[31] *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945).

[32] The contention that the Article XX decision itself must be deferred to, since IUMSWA fully participated therein, is clearly without merit. Although the issue of the representation of Jackson's employees at the Staten Island yard was considered and decided, NLRB standards, policies, considerations and precedents, in neither the unfair labor practice nor representation case area were evaluated nor considered in the Article XX proceeding. The Board has exclusive jurisdiction to resolve questions of representation, and will not defer to private resolutions such as an Article XX proceeding, of such questions. *Weather Van Outwear Corp.*, 233 NLRB 414 (1977); *Anheuser Busch Inc.*, 246 NLRB 29 (1979).

buffed consistently in its approach by numerous circuit courts of appeals.[33]

Although the Second Circuit Court of Appeals has approved the Board's *Midwest Piping* approach,[34] it has recently expressed some reservations on whether it intends to continue to do so. Thus, in *American Can v. N.L.R.B.*, 535 F. 2d 180 (2nd 1976), the Court while enforcing the Board's Order,[35] took pains to point out that it was not endorsing the Board's approach in these cases. The Court quoted the 7th Circuit's summary in *Playskool, supra*, of the difference between the approach of the Board and the courts on this issue as follows:

> The Board looks first to the support held by the minority union and finds a "question concerning representation" if the claim of that union is "not clearly unsupportable"; the courts look first to the support held by the majority union and find that no "question concerning representation" exists if that union has the validly-obtained support of an employee majority and the rival union is thus shown to be "no genuine contender." 477 F. 2d at 70 n. 3.

After noting that Courts have rejected the Board's view that *Midwest Piping* applies even where one union has shown that it represents a majority in the contested unit, the Court found that this was not the case in *American Can*, where there was no showing of majority support for the recognized unit among the disputed employees. Thus, the Court found that the Circuit Court cases cited above, which rejected the Board approach were not controlling. However, in Footnote 7, the Second Circuit opinion states: "We of course, express no view as to the correctness of these cases, nor do we imply any approval of the

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[33] *Playskool Inc. v. N.L.R.B.*, 477 F. 2d 66 (7th Cir. 1973); *N.L.R.B. v. Peter Paul Inc.*, 467 F. 2d 700 (9th Cir. 1972); *Modine Mfg. Co. v. N.L.R.B.*, 453 F. 2d 292 (8th Cir. 1971); *American Bread Co. v. N.L.R.B.*, 411 F. 2d 147 (6th Cir. 1969); *N.L.R.B. v. Air Master Corp.*, 339 F. 2d 553 (3rd Cir. 1964).

[34] *Hudson Berlind Corp.*, 494 F. 2d 1200 (2nd Cir. 1974); *N.L.R.B. v. Midtown Service Co.*, 425 F. 2d 665 (2nd Cir. 1970).

[35] 218 NLRB 102 (1975).

Board's practice of adhering to its position after it has been rejected by several courts of appeals."

Thus, the Second Circuit's current view of *Midwest Piping* is certainly open to question, and since this case clearly falls into the area of cases where courts have rejected the Board approach,[36] this is but another reason why serious consideration should be given to the approval of the withdrawal request with respect to this portion of the complaint.

Moreover, I note that the Regional Director's letter denying IUMSWA's request to withdraw its charges makes no specific reference to the *Midwest Piping* allegations. It is true as pointed out by General Counsel that the letter states that the charges disclosed evidence of serious violations including the concealed payments, and that therefore it could be argued that the *Midwest Piping* allegations are encompassed by such a description. However, in the absence of any discussion of the issue, I cannot determine whether the Director considered the *Midwest Piping* violations to be "serious" violations, in and of themselves sufficient to justify denial of the withdrawal request, even absent the presence of any other alleged violations. It is more likely, in view of the emphasis placed in the letter on the concealed payments issue, that the Director felt that since the *Midwest Piping* violations were allegedly committed by the same parties who were involved in the concealed payments, that the entire matter should be litigated fully.

Counsel for General Counsel seems to suggest that the *Midwest Piping* allegations are sufficiently serious violations in and of themselves to warrant denial of the withdrawal request, but also argues that the concealed payments establishes a specific proclivity by Jackson to deal with the ILA, which sheds light on the *Midwest Piping* allegations as well.

Although the arguments in favor of granting the withdrawal request as to the *Midwest Piping* aspects of this case are quite

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[36] It is undisputed that at the time the September 1979 modifiation contract was signed, the ILA represented an overwhelming majority of employees employed at the Staten Island plant.

compelling, after careful consideration and balancing of all the relevant factors and positions, I am contrained to conclude that the withdrawal request should not be granted as to this portion of the complaint either, and that the purposes and policies of the Act and the public interest would best be served by a determination on the merits of the entire complaint herein.

Initially it must be noted that the Board in representation cases, although having a policy of accommodating efforts being made to resolve disputes between unions under no raid agreements,[37] has frequently found it necessary to refuse to approve withdrawal requests filed pursuant to such no raid proceedings. In *Cadmium & Nickel Plating, Division of Great Lakes Industries Inc.*,[38] the Board refused to permit withdrawal of a petition, which was requested due to an order from the AFL-CIO based on their no raid pact provisions. The Board characterized this withdrawal request as not being voluntary, but due to the compulsion exerted under and arising from the no raid pact. Thus, the Board found that to allow withdrawal of the petition under these circumstances, "would be to permit a private resolution of the question concerning representation in a manner contrary to the policies of the Act and would impinge upon the Board's exclusive jurisdiction and authority to resolve such questions of representation." Id. at 354. As noted above, the Board has consistently adhered to this view. See *Anheuser Busch, supra; Weather Vane, supra.*

It would seem to follow that permitting a withdrawal compelled by an Article XX proceeding, in an unfair labor practice case as here, would be even more contrary to the policies of the Act, since if the allegations are sustained by the evidence, Respondents will have been found to have unilaterally abrogated to themselves the Board's function of resolving a question concerning representation.

Moreover, while IUMSWA's defunctness renders the outcome of any election that might be eventually ordered herein

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[37] *Mack Trucks*, 209 NLRB 1003 (1974); N.L.R.B. Field Manual, sec. 11050.

[38] 124 NLRB 353 (1959).

probably a foregone conclusion, the remedy ordered however would still be meaningful. The complaint alleges 8(a)(3) and 8(b)(2) violations based on the existence of a union security clause in the contract. Thus, assuming a violation were to be found herein, a substantial number of employees would be entitled to a refund of dues they paid pursuant to this clause. Accordingly, approval of the withdrawal of the charge insofar as it relates to the *Midwest Piping* allegations, could result in deprivation of monies due to a large number of employees for a substantial period of time.[39]

Finally, there is the question of the possible connection between the unlawful payments and the Midwest Piping allegations.

I note that although the complaint alleges no connection between these events, it is of course obvious that the same parties who entered into the concealed payments arrangement entered into the contract which is alleged to be unlawful. [40]

Moreover, the complaint alleges that the final payment made by Jackson to the ILA was made in July of 1975, at the same time that the parties were negotiating the contract alleged herein to have been unlawfully executed. These circumstances suggest at least an arguable connection between the two aspects of this

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[39] Respondent Union argues with respect to this issue, that this would not be a hardship to employees and in fact payment of their dues would be a windfall to the employees, since they were obtaining adequate representation from ILA for this period of time. They also point out that the ILA contract contained higher wages and benefits than the Brewer's contract with IUMSWA. However, in any 8(a)(2) case, the employees have obtained representation and benefits from the unlawful contract, and the Board routinely grants a refund of dues to those employees who were not previously members of the assisted Union, on the grounds that their membership was automatically deemed to be coerced by virtue of the union security clause int the contract.

[40] The fact that different individuals of Jackson or ILA were involved in the two aspects of the case is not determinative, although the issue of agency is of course crucial to a determination of the merits. However, for purposes of assessing the wihdrawal request, the complaint allegations must be deemed proved, and therefore an assumption that the same parties were involved in both aspects of the charge is appropriate.

litigation, and is but another reason for me to conclude, which I do, that the Public interest and the purposes and policies of the Act would best be serve by a full determination on the merits of all allegations in the instant complaint. Therefore I shall deny in full the request of IUMSWA to withdraw its charges and shall proceed to dispose of the complaint on the merits.

B. The Concealed Payments

The evidence is undisputed that at various times between early 1976 and mid 1979, Seregos made concealed payments in cash to Anastasio of amounts of money comprising 10% of the business referred to Jackson by Anastasio and/or Scotto. [41]

Respondent Employer raises Section 10(b) of the Act as an affirmative defense to this allegation of the complaint, claiming that any payments made prior to 6 months before the filing of the charges herein are time barred. However it is well settled that the period of limitations prescribed by Section 10(b) does not begin to run on alleged unfair labor practices, until the person adversely affected is put on notice of the act constituting it. [42]

The payments herein were clearly concealed and only came to light through Seregos' testimony at the criminal proceedings which occurred within the 10(b) period. Thus, the concealment of the conduct of these unlawful payments prevented the timely filing of a charge, and the 10(b) period is therefore tolled, until

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[41] These sums, totalling $63,750 represented business referred to Jackson from U.S. Lines and Prudential Lines. In addition, the record revealed that Seregos in July of 1979 gave $4,000 to Anastasio for the purpose of assisting Scotto's defense fund. The record does not establish whether this payment constituted a percentage of any business referred to Jackson. In fact the record appears to indicate the contrary, since Anastasio was apparently asking at that time a number of employers in the industry to contribute to Scotto's defense fund.

[42] *Don Burgess Construction Corp. d/b/a Burgess Construction*, 227 NLRB 765 (1977); *Wisconsin River Valley District Council of United Brotherhood of Carpenters & Joiners, AFL-CIO (Shipping Enterprises Inc.)*, 211 NLRB 229 (1974).

the conduct was discovered by virtue of the criminal action. Thus, 10(b) does not preclude the finding of any violations herein.

With respect to the merits of this allegation, the parties do not disagree that such payments if made by Jackson to "a labor organization", constitute violations of Sections 8(a)(1) and (2), and 8(b)(1)(A) of the Act, even though such conduct may also involve criminal violations under other sections of other Federal laws, *Sweater Bee by Baniff, Ltd.* , 197 NLRB 805 (1972).

The key issue, that is in substantial dispute herein, is the question of whether the payments were made to "a labor organization", or put another way, whether Anastasio and Scotto were agents of the ILA with respect to this conduct. The starting point for discussion of the liability of unions for conduct of its officials is the much cited Board case of *International Longshoremen's and Warehousemen's Union (Sunset Line & Twine Co.*, 79 NLRB 1487 (1948). All parties have cited various portions of this opinion to support their respective positions as to the responsibility of the ILA for the receipt of these payments by its officials from Jackson.

The Board observes therein that the act does not regulate individuals acting in a private capacity, but only employees or labor organizations or their agents can commit unfair labor practices. Therefore, the question is whether the conduct of the individuals can properly be imputed to the Union, for "unless the record justifies that imputation there was no violation of the Act in this case. In determining whether or not the evidence does afford a basis for holding the union responsible for the episodes in question, the Board has a clear statutory mandate to apply the ordinary law of agency." (footnote ommitted) Id. at 1507.

The Board then set forth those fundamental rules of the law of agency which is to control decisions on the issue of union responsibility for the conduct of its officials:

1. The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority. In this case, for example, it was incumbent upon the General Counsel to prove not only that the acts of restraint and coercion alleged in the complaint were committed, but also that those acts were committed by agents of the Respondent Unions, acting to their representative capacity. The Respondents' failure to introduce evidence negating the imputations in the complaint did not relieve the General Counsel of that burden.

2. Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority. Footnote ommitted. Id. at 1508.

3. A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.[44]

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[44] Restatement Agency, Secs. 219, 228-237. This is the effect of Section 2(13) of the Act, which provides,

> In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the *specific acts performed* were actually authorized or subsequently ratified shall not be controlling. [Emphasis supplied.] Id. at 1509.

The Board in *Sunset Twine, supra,* in finding acts of violence related to picketing to be attributable to the Union, found that the absence of proof of specific authorization or ratification to be immaterial, so long as there was evidence that the Agent was on that occasion acting within the scope of his general authority to direct the strike and picketing. The union was responsible for wrongful acts which were performed in furtherance of the same purposes and were of the same general character as or incidental to the picketing.

The instant case present a rather unique and unprecedented application of the principles of agency set forth in *Sunset Twine, supra.* There is no question that Anastasio's authority extened to organizing employees, securing recognition and executing and administering collective bargaining agreements with employers. The record is devoid of any evidence that he was authorized to obtain additional business for employers and to enter into arrangements for payments from said employers for such referrals. Respondents argue that no interest of the ILA is served or furthered by the payments herein, and that the actions of Anastasio were "simply a personal adventure or frolic", and not attributable to the Union.[43]

As pointed out by Respondents, there is no evidence that the ILA received any of the monies paid by Jackson to Anastasio, nor any evidence that the ILA received any other tangible benefit from such payments.

However, the record does establish that the arrangement between Anastasio and Seregos for these payments and the job referrals is not so easily divorced from Anastasio's position and responsibilities with the ILA. The unlawful arrangement was intimately connected to and arose out of Jackson's decision to

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[43] *Lyon v. Carey,* 533 F. 2d 649 (D.C. Cir. 1976); *International Distributing Corp. v. American District Telegraph Company,* 569 F. 2d 136 (D.C. Cir. 1977); *Brennen State Bank v. Hartford Accident & Indemnity Co.,* 427 F. 2d 425 (7th Cir. 1970).

recognize and sign a collective bargaining agreement with the ILA for the representation of Jackson's employees.[44]

During the period of years wherein business was referred to Jackson by Anastasio and Scotto, the number of unit employees as well as Jackson's gross revenues increased substantially. The record does not establish that this increase in employees and business was solely or even primarily attributable to the above described referrals of business, but there is no question that these referrals were quite significant in enhancing Jackson's success. Such a turn of events cannot help but to have furthered the interests of the ILA. It is not clear from the record whether the firms who performed the work for U.S. Lines and Prudential previous to Jackson being retained, were ILA represented companies. Thus, it is not certain that the referrals herein resulted in any additional jobs for ILA members. Nevertheless it is in my judgment reasonable to conclude, which I do, that increases in business for Jackson thereby advancing and improving the viability of said company, has a tendency to produce additional work opportunities (such as overtime, less time on layoff, more regularity of employment) for ILA members, more monies to be paid into ILA funds, and generally is supportive of the interests of the Union.

Moreover, the arrangement herein was carried out over a period of time of some four years, with all payments being made at the ILA's office, while Anastasio was actively involved in administering the collective bargaining agreement then in existence between Jackson and the ILA. This is hardly conduct which one could characterize as an "individual frolic" or a "personal adventure."

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[44] It is true that Seregos made the initial contact with Anastasio concerning representation of Jackson's employees, and that Seregos may very well have agreed to sign a contract with the ILA without any agreement for referrals. Indeed the record reveals that Seregos believed that his firm's becoming affiliated with the ILA would in and of itself produce more business for his Company. Nevertheless, the record establishes that the unlawful arrangement and the recognition were concurrently agreed to, and that Anastasio made it clear to Seregos that he would not refer any business to him unless he became and remained an ILA shop.

Additionally, I note that Anastasio during this period of time was the second ranking official of the ILA. Scotto the ILA president, and the highest ranking official of the Union, I find to have participated in or at the very least condoned the unlawful activity of Anastasio. Thus, the record reveals that Scotto in the fall of 1975 at the ILA office, in the presence of Anastasio, replied to Seregos' request for work, by offering to help him obtain the U.S. Lines account, discussed the commission arrangement, and suggested that Seregos use a foreign corporation to facilitate the payments. Shortly thereafter Seregos received a call from a U.S. Lines official notifying him to start work on a U.S. Lines vessel. Subsequently work was performed by Jackon for U.S. Lines, and Seregos paid Anastasio 10% of the gross business on such work. These circumstances are sufficient to establish Scotto's participation in and at the very least condonation and approval of the arrangement entered into between Anastasio and Seregos.[45]

Accordingly, we have a situation where the two highest officials of the ILA have participated in the scheme of referrals coupled with unlawful payments. It is hard to imagine what more should be required to establish Union responsibility for this conduct. Is it necessary for all the Union's officers to have condoned the activity? Or must the Executive Board approve it? Or perhaps the Union membership must vote to approve this conduct. In short, to carry Respondents' arguments to its logical extension, this kind of conduct can never be attributed to the Union, since the receipt of bribes or kickbacks is not in furtherance of any Union purposes. I do not believe that the law as to agency is so restrictive. As the Supreme Court has observed in

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[45] It is irrelevant that Scotto was not indicted criminally for his conduct in volving Jackson and Seregos. The standard of proof necessary in criminal proceedings is quite different from the quantum of evidence necessary to establish a violation of the National Labor Relations Act. Moreover, I need not and do not find that Scotto actually received any of the payments from Seregos, as was apparently the charge in the indictments. I need only find which I do that Scotto was aware of and condoned and approved Anastasio's activities in this regard.

a case involving kickbacks and the agency status of employer representatives:

> The Court of Claims, in holding that the Act does not authorize government cancellation because of kickbacks, relied heavily on its finding that none of the officers of Acme were aware of the kickbacks. But as previously stated *those of Acme's employees and agents who did know were in the upper echelon of its managers.* One of the guilty employees was the general manager of one of the company's chief plants and the son of Acme's president, and the two other kickback receivers were in charge of operations, sales, and government contracts. They were the *kind of company personnel for whose conduct a corporation is generally held responsible.* Cf. *Gleason v. Seaboard Air Line R. Co.*, 278 U.S. 349, 49 S. Ct. 161, 73 L. Ed. 415. Since *Acme selected those agents to carry on its business in obtaining and performing government contracts, there is no obvious reason why their conduct in that field should not be considered as Acme's conduct, particularly where it touches the all important subject of kickbacks.* (Emphasis supplied).

United States v. Acme Process Equipment Company, 385 U.S. 138, 87 S. Ct. 350 at 356 (1966).[46]

Accordingly, based on the above factors and analysis, I conclude that the evidence warrants the finding which I make that Anastasio and Scotto were acting as agents of the ILA in their

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[46] I would note that all the cases cited by Respondents (e.g. see footnote # 43) involve low level employees, such as deliverymen and repairmaen, and deal with one time activities such as a rape, assault or a theft. On the other hand the instant case involves as noted, a long time continuing relationship encompassing conduct by the two highest officials of the Union, which took place at the ILA's offices. To characterize such activities as "frolics" or "personal adventures" of Anastasio and Scotto, is hardly an apt description of the circumstances herein.

participation in the arrangements for the receipt of concealed payments from Seregos acting on behalf on Jackson.[47]

Therefore by such conduct, Respondent Employer has violated Section 8(a)(1) and (2) and Respondent Union Section 8(b)(1)(A) of the Act, and I so find.

C. The Alleged Midwest Piping Violations

The complaint alleges that Respondents on or about September 13, 1979 executed a contract recognizing ILA as the representative of Jackson's employees at the Staten Island facility, containing a union security clause, notwithstanding the fact that a real question concerning representation of said employees had been raised and was pending by virtue of requests for recognition made by IUMSWA.

In support of this contention, General Counsel argues that Jackson's purchase of the Staten Island yard for 2.5 million dollars, by which it acquired a facility including dry docks and cranes, enabled it to bid on combination jobs, and resulted in a large increase in business as well as the hiring of substantially more employees. Therefore General Counsel contends that these actions constitute substantial changes in Jackson's operations, resulting in essentially a new operation, which are sufficient to raise a question concerning representation of its employees, when coupled with IUMSWA's representational claims. In this regard, General Counsel points to IUMSWA's historical interest in representing the employees at the Staten Island yard, the employment by Jackson of only former Brewer employees during the period immediately after its purchase of the year, and its employment of 23 former Brewer employees, by October 25, 1979, when it was fully staffed.

Respondents, on the other hand contend that the acquisition of the Staten Island yard by Jackson should be characterized as a relocation of its Brooklyn facilities, which did not result in a

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[47] There is no dispute from any of the parties, as well there should not be, that Seregos was acting as an agent of Jackson in connection with his actions herein.

substantial change in the nature of its operations. Therefore, the contract which it executed in September of 1979, modifying the existing collective bargaining agreement between the parties, constitutes a bar to any petition being filed, and therefore precludes the existence of a question concerning representation at that time. Alternatively, Respondents argue that even if the contract is not considered as a bar, that IUMSWA's alleged claims for representation are insufficient to create a real question concerning the representation of the employees involved herein.

While the issue is not free from doubt, I am convinced that Respondents' analysis of the facts and the applicable precedents is more persuasive, and find that no question concerning the representation of Jackson's employees existed when the parties executed their agreement in September 1979.

In *Shea Chemical Corp.*,[48] the Board made it clear that the *Midwest Piping* doctrine does not apply in situations where, because of contract bar or other established reasons, the rival claim does not raise a real representation question.

The Board in *General Extrusion Company Inc.*[49] and *Deluxe Metal Furniture Company*,[50] codified, expanded and explicated its rules dealing with contract bar issues, several of which have significance in the evaluation of the facts herein.

The Board has consistently applied contract bar rules and principles, including those set forth in *General Extrusion, supra*, in unfair labor practice cases involving violations of Section 8(a)(2)[51] as well as 8(a)(5)[52] of the Act.

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[48] 121 NLRB 1027, 1028 (1958).

[49] 121 NLRB 1165 (1958).

[50] 121 NLRB 995 (1958).

[51] *Clark Equipment Co.*, 234 NLRB 935, 940 (1978); *Klein's Golden Manor*, 214 NLRB 807 (1974); *American Beef Packers Inc.*, 218 NLRB 634 (1970); *Hayes Coal Inc.*, 197 NLRB 1162 (1972).

[52] *Marine Optical Inc.*, 255 NLRB 1213 (1980); *Westwood Import Company, Inc.*, 25 NLRB 1213 (1980); *Lammert Industries Inc.*, 229 NLRB 895 (1977).

Thus it becomes necessary to determine whether as alleged by Respondents, their 1978-81 contract, as modified in 1979, constituted a bar to any representation claim that may have arisen by virtue of IUMSWA's demands.

The actual modification of substantive provisions of a contract by the parties during its term, whether or not the contract contains a modification clause, will not remove the contract as a bar, absent actual termination of the contract.[53] General Counsel does not contest the fact that the parties' actions in 1979 of negotiating new terms and conditions of employment for some of its employees at the Staten Island facility, constitutes a modification of their 1978-81 contract.[54]

I also find that the record overwhelmingly supports such a conclusion. It is clear that the parties intended the 1979 agreement to be a modification of the existing "blue book" agreement, which remained in effect as to 25 employees who were considered to be Jackson's "basic outside crew." Thus, the 1978-81 agreement was not terminated in 1979, but merely modified, and these modifications did not remove the contract as a bar.[55]

In *General Extrusion, supra*, the Board as noted, revised and clarified certain aspects of its contract bar policy, particularly

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[53] *Deluxe Metal, supra.*

[54] Indeed, General Counsel stipulated into the record, the findings of the Article XX decision that the 1979 agreement was a modification of the then existing collective bargaining agreement. Moreover, General Counsel in his brief refers to the parties action in September of 1979 as a modification of the prior agreement.

[55] It is of course true that the modifications also encompassed the changing the expiration date of the old contract, thus constituing a premature extension of the 1978-1981 contract. However, the Board does not prohibit premature extensions, but only subjects such extensions to the condition that if a petition is filed during the open period, calculated from the expiration date of the old contract, the premature extension will not be a bar. *H.L. Klion Inc.*, 148 NLRB 656 (1964). Thus a representation claim could have been raised 60-90 days prior to the expiration date of the 1978-1981 contract. However, IUMSWA's claims were made in the spring of 1979, at a time when any petition filed would have been untimely with respect to such agreement. Cf. *Western Electric Co., Inc.*, 94 NLRB 54 (1951).

with regard to changed circumstances within the contract term. The Board observed therein in relevant part:

> "Thus, we shall adhere to the rule that a contract does not bar an election if changes have occurred in the nature as distinguished from the size of the operations between the execution of the contract and the filing of the petition, involving (1) a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes; or (2) resumption of operations at either the same or a new location, after an indefinite period of closing, with new employees. However, a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit, does not remove a contract as a bar."

121 NLRB at 1167-68 (Footnotes omitted).[56]

What is in dispute however, and what constitutes the determinitive issue herein, is whether the actions taken by Jackson should be characterized as having changed the nature of the operations, involving a merger of two or more operations resulting in creation of an entirely new operation with major personnel changes, as alleged by General Counsel, or "a mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees in the contract unit," as alleged by Respondents.

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[56] The Board in *General Extrusion*, *supra*, also set forth criteria to be utilized in expanding unit situations, requiring that a contract will be a bar only if at least 30% of the employee employed at the time of the hearing had been employed at the time the contract was executed, and 50% of the job classifications in existence at the time of the hearing, were in existence at the time the contract was executed. This aspect of *General Extrusion* is not in issue herein, as General Counsel concedes and the record discloses that this criteria was met, and that Jackson employed a representative complement of employees at the time the parties modified their contract and applied it to the Staten Island facility.

I am persuaded that the record establishes that Jackson's purchase of the Brewer facility and its consequent affect on its operations, should be characterized as a "*a mere relocation*"[57] under the *General Extrusion* standards.

An examination of the factors deemed controlling by the Board in *General Extrusion, supra,* on this issue, i.e. whether there is a change in the character of the jobs and the functions of the employees in the contract unit, reveals that the contract is a bar to any representative claim asserted by IUMSWA. Thus Jackson, notwithstanding the acquisition, is still engaged in the same business performing essentially the same work, and is still operating its Hoboken machine shop and performing pierside repairs at other companies' piers.

Most significantly, the employees at the new facility employ essentially the same skills and perform the same functions as they did at Jackson's Brooklyn facilities. See *Marion Power Shovel Company,* 230 NLRB 576 (1977); *Electrospace Corporation of Puerto Rico,* 189 NLRB 572 (1971).

It is true as pointed out by General Counsel that Jackson's new facility which cost 2.4 million dollars now contains a dry dock, which permits Jackson to bid on combination type jobs. Though the addition of the dry dock has resulted in increases in the amount of work obtained by Jackson, the new work involved, i. e. bottomside work comprises less than 10% of Jackson's business. Moreover, the dry dock has resulted in only two new classifications, that of dock hands and crane operators, which have been performed by less that 5% of Jackson's workforce.

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[57] I note in this connection, that paragraph 11(e) of the complaint alleges that Jackson terminated its operations at Brooklyn, and *relocated* (emphasis supplied) said operations at the Staten Island facility transferring all or most of its employees employed in Brooklyn who were represented by ILA. Similarly the Regional Director in his dismissal letter with respect to IUMSWA's 8(a)(5) charge, found that Jackson purchased the facility from Brewer to replace and suplant its Brooklyn facility, and that in September 1979 Jackson closed its Brooklyn facility, and that in September 1979 Jackson closed its Brooklyn facility and relocated to the former Brewer yard in Staten Island, taking with it its work force from Brooklyn.

Of the remaining jobs and skills, there is no difference in craft complexity from Jackson's prior operations. Thus, bottomside and topside work require identical skills, training and ability. There is no such thing as a bottomside or topside crew, and employees work interchangeably on repairs of both sides of the vessel.

It is apparent that the changes in Jackson's operations as a result of the purchase of the Staten Island facility, were not of the magnitude contemplated by the *General Extrusion* rule.[58] I find therefore that Jackson's operations have remained substantially the same, following its relocation to Staten Island, since the move has not caused changes in the character of the jobs or the functions of its employees. *Marine Optical, supra; Westwood Import, supra; Pepsi Cola, supra; W.T. Grant Co.*, 197 NLRB 955 (1977).[59]

General Counsel places considerable reliance upon *Hudson Berlind Corporation*[60] in support to his position herein. While this case does contain some similarities to the facts at hand, I find that upon close examination that there are several significant distinguishing factors which leads me to conclude that it is not dispositive of the issues before me.

In *Hudson Berlind* the Respondent purchased two warehouses from different employers, one located at Floral Park and the other in Brooklyn. These warehouses were represented by different unions with different collective bargaining agreements. Respondent from the outset of the purchase intended to merge both warehouses into a larger facility in Hicksville, Long Island, some 40 miles from Brooklyn.

While both prior collective bargaining agreements were still in existence, Respondent decided that he would deal with the

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[58] *Pepsi Cola Bottlers Inc.*, 173 NLRB 815 (1968).

[59] There can be no dispute herein concerning the requirement in *General Extrusion* of the transfer of a considerable proportion of the employees to the relocated plant, since the complaint alleges and the record reveals that almost all of Jackson's employees relocated from Brooklyn to Staten Island.

[60] 203 NLRB 421 (1973) enf'd. 494 F. 2d, 1200 (2nd Cir. 1974).

union representing the Brooklyn warehouse (Local 222) for the new Hicksville location since the Brooklyn warehouse employed three times as many employees as the Floral Park warehouse. Therefore Respondent signed a contract with Local 222 covering the Hicksville location, before any employees were hired at that location. Subsequently, a majority of employees who eventually transferred to the Hicksville location came from the Local 222 represented Brooklyn warehouse. The Administrative Law Judge on these facts, applying the *General Extrusion* criteria, found the Hicksville operation to be a relocation of the Brooklyn warehouse, since a considerable proportion of employees were transferred and the jobs and functions were not changed. Thus, he found the contract with Local 222 to be a bar to any claims of the other Union.

The Board reversed the Administrative Law Judge and found a violation of Section 8(a)(2), concluding that the newly established Hicksville facility was a new operation resulting from the closing of two warehouses and the establishing of an entirely new facility. the Board further found that the above facts represented "a type of vice *Midwest Piping* was designed to prevent: the unilateral selection by an employer between conflicting representational claims of two or more unions, which thereby deprived the employees involved of their rights to have the question determined by the Board's processes, insuring their own freedom of selection." Id. at 423.

While these findings and the Board's language set forth above, on their face seem somewhat applicable to the instant matter, a careful analysis of the facts and the Board's opinion reveal several significant distinguishing factors. Most importantly, in *Hudson Berlind*, Respondent combined and merged operations of two warehouses, each represented by different incumbent unions. As the Board found, "the newly established Hicksville facility was no more a part of or an accretion to the Brooklyn operation than to the Floral Park warehouse." Id. at 422. The Board was not impressed by the fact that a majority of the new facility was staffed by Local 222 employees, since at the time the contract was executed, neither union had "a conclusive or clearly predominant position." Id. at 422. Thus, contrary to the

instant case, Respondent in *Hudson Berlind* was faced with conflicting claims of two unions *currently* representing the employees to be transferred. Therefore the Board found that the contract executed between Local 222 and Respondent therein could not be a bar to any claims of the Union representing the employees at the Floral Park plant. Additionally, also contrary to the instant case, the contract executed by the parties was found to be a pre-hire contract, since no employees had been hired at Hicksville at the time the contract was signed.[61]

Accordingly, I find that *Hudson Berlind* does not alter my conclusion that Jackson's move to Staten Island from its Brooklyn facilities, constitutes a mere relocation of these facilities,[62] accompanied by the transfer of a considerable proportion of employees, without an accompanying change in the character of the jobs and functions of the employees in the unit, and that the parties' 1978-81 contract, as modified in 1979, constitutes a bar to any representational claim IUMSWA may have raised.

Turning to the issue of IUMSWA's claims, I conclude in agreement with Respondents, that even assuming that no contract bar were to be found herein, that the claims raised by IUMSWA in the instant case do not rise to the level of a "real question concerning representation" of Jackson's employees at the Staten Island facility.

In this connection, it is necessary to determine whether IUMSWA's claims are "clearly unsupportable and lacking in sub-

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[61] As noted, the contract herein was executed in September, after 95% of the employees hired were ILA members transferred from Jackson's other facilities. Contrary to the General Counsel, I do not believe that the increase in the number of regular employees hired after it began operations is sufficient to change the characterization of Jackson's move from a relocation to a new operation. See *Marion Power, supra; Lutheran Homes and Hospitals Inc. d/b/a Fairlawn Care Center*, 233 NLRB 1025 (1977).

[62] The fact that Jackson's employees were transferred from two prior locations, into the one Staten Island facility, does not change the characterization of the move as a relocation, where the *General Extrusion* criteria have been met. See *Arrow Co. A Div. of Cluett, Peabody & Co., Inc.*, 147 NLRB 829 (1964).

stance."[63] In my judgment IUMSWA's claims can and should be so characterized. It must be noted that IUMSWA at no time made any claim or assertion to Jackson that it represented any of Jackson's employees. It never attempted to organize or solicit any authorization cards from Jackson's employees nor to present any evidence to Jackson of any support that it might have among Jackson's employees.[64] On the contrary, IUMSWA began to assert its alleged contractual and territorial rights with respect to the shipyard before Jackson began performing ship repair work, before it employed any bargaining unit employees to perform ship repair work, and before IUMSWA knew whether Jackson would be employing any former IUMSWA members. Thus, IUMSWA's claims herein were not based on the desires of any of Jackson's employees for representation by IUMSWA, but solely based upon the fact that it had been certified to represent to represent employees of Brewer at the shipyard and that it had a successorship clause in its contract with Brewer. These kinds of claims, which are independent of and often contrary to the representational desires of the employees of the new employer, should not be held sufficient to create a colorable claim of representation. There is no such concept in Board law that a contracting union has a continuous right to recognition on the basis of location, regardless of the desires of the particular employees involved.[65]

General Counsel places considerable emphasis upon the fact that from June through September, while Jackson was engaged in cleaning up and preparing the facility for its operations, the only employees employed by it were former Brewer workers. However, the evidence discloses that during this period, Jackson (through Waterford Marine, its parent) employed only one

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[63] *Playskool Inc. a Division of Milton Bradley Company*, 195 NLRB 560 (1972) enforcement denied 477 F. 2d 66 (C.A. 7, 1973).

[64] Cf. *Hudson Berlind, supra*, where the Board relied in part, in finding the presence of a real question concerning representation upon the fact that the minority union was able to obtain a sufficient showing of interest from employees of the employer to support a representation petition.

[65] *Fraser & Johnston Company*, 189 NLRB 142, 150 (1971). See also *Schreiber Trucking Company*, 148 NLRB 697, 703 (1964).

former Brewer bargaining unit employee. The remaining former Brewer workers employed by Jackson, were employed in supervisory or other non-bargaining unit positions while working for Brewer, thus affording no basis for any assumption or presumption that these individuals preferred IUMSWA as their collective bargaining representative, and providing no support for any representational claims of IUMSWA. Moreover, the Board in assessing 8(a)(2) cases, looks to a period of time when employees are engaged in regular production work, and not as here when employees are primarily engaged in cleaning up and preparing the premises.[66]

Therefore, I conclude that between June and September, Jackson was not functioning as a production enterprise, and the employees were not part of a normal and functioning appropriate collective bargaining unit. *Allied Products Corp.*, 220 NLRB 732 (1975).

Thus, the fact that Jackson employed one former Brewer bargaining unit employee to perform electrical maintenance work, during this period of time, even where that individual was eventually hired by Jackson after normal operations commenced, is insufficient to create a colorable claim by IUMSWA to the representation of Jackson's employees.

General Counsel also relies on IUMSWA's historical interest in representation of employees at the Staten Island shipyard, as creating a real question concerning representation, citing *Hudson River Aggregates*, 246 NLRB 192 (1979), in support thereof. As I have already noted above, I do not believe that IUMSWA's "territorial claims" based on its prior recognition or contract with a prior employer, have any significance in assessing this issue, absent evidence of employee support for IUMSWA from Jackson employees. *Hudson River, supra*, is not to the contrary. There the Board found an employer to be a successor employer and in violation of Section 8(a)(5) of the Act, because among other factors, it actually hired a majority of the alleged prede-

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[66] *Lianco Container Corp.*, 173 NLRB 1444, 1448 (1969); *Young & Greenwalt Co.*, 157 NLRB 408 (1966); *Freuhalf Trailer Co.*, 162 NLRB 195 (1966).

cessor's employees. The case does not stand for the proposition apparently advanced by General Counsel that an unsubstantiated and invalid successorshp claim[67] creates a real question concerning representation.

The Complaint alleges a violation to have occurred in September when Respondents executed their modified collective bargaining agreement extending recognition to the ILA. At this time, Jackson employed two bargaining unit employees who had been members of the Brewer bargaining unit represented by IUMSWA. The record does not reveal whether these employees were employed by Brewer at the time Brewer closed down its operations in May. The record does reveal a gradual winding down of Brewer's operations, and layoffs of employees throughout 1979. Thus, it is conceivable that either of these employees may have had some interim employment between the time they were terminated by Brewer and employed by Jackson.[68] It is thus uncertain whether any presumption of support for IUMSWA as their bargaining representative with respect to Jackson can be made. However, I need not decide this issue, as I conclude that even if it is assumed that these two employees of Jackson in September can be deemed to have designated IUMSWA to represent them with respect to their Jackson employment, by virtue of their prior inclusion in the IUMSWA bargaining unit, that in a bargaining unit of 51 on September 5, when operations commenced and out of 55 on September 13, the date the modification was executed, their presence is insufficient to create a real question concerning representation.[69]

I note that in each of the cases cited in the preceding footnote, where the Board found no real question concerning representation to be present, the unions involved presented claims of

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[67] I note that the Regional Director dismissed IUMSWA's 8(a)(5) charges, based upon a successorship theory.

[68] This is less likely in the case of Boschi, who was employed by Jackson as of June in connection with the cleaning up and maintaining the facility.

[69] *Dillon's Companies Inc.*, 237 NLRB 759 (1978); *Robert Hall Gentily Road Corporation d/b/a Robert Hall Clothes*, 207 NLRB 692 (1965); *Boys Market Inc.*, 156 NLRB 105 (1965).

significantly greater substance, particularly in terms of employee support with respect to the employer involved, than the claims asserted by IUMSWA herein.

General Counsel also relies upon the fact that by October 25, Jackson had hired 23 employees who had been formerly employed in the Brewer's unit represented by IUMSWA. He argues that such a hiring could reasonably have been anticipated by the parties, as evidenced by the fact that they agreed to a reduction in contract benefits for a portion of the bargaining unit in contemplation of increased work opportunities for employees by virtue of the shipyard's facilities. General Counsel cites *American Can Co.*, 218 NLRB 102 (1975) enf'd. 535 F. 2d 180 (2nd Cir. 1976), in support of his contention that these circumstances are sufficient to create a real question concerning representation of Jackson's employees. I do not agree with General Counsel's analysis nor his reliance upon *American Can*, *supra*, as authority for his position.

In *American Can*, the employer for some 30 years operated a plant in Jersey City, New Jersey, wherein it had recognized the Steelworkers Union for its production and maintenance employees and the Amalgamated Lithographers Union, (ALA) for a unit limited to lithographic employees. The employer announced plans to shut down the plant and move to another plant, and invited applications for transfers to the new plant. The ALA advised the employer that a majority of the lithographic employees desired to move to the new plant and to be represented by the ALA at such plant. The employer indicated that it preferred a single unit at the new plant and refused to recognize the ALA at the new facility.

When the new plant opened, lithographic work was still being performed at the Jersey City plant, but with the expectation that all such work would be transferred to the new facility. The employer signed a collective bargaining agreement with the Steelworkers, for a unit including the lithographic employees, and then offered to transfer five ALA represented employees to the new plant on condition that they join the Steelworkers pursuant to the union security clause of the contract.

In these circumstances, the Administrative Law Judge found no 8(a)(2) violation, reasoning that since the employer had no obligation to recognize the ALA at the new plant, ALA did not have a colorable claim to representation sufficient to raise a real question concerning representation.

The Board reversed, finding that the Administrative Law Judge confused the existence of a question concerning representation with its resolution, and thereby misapplied the doctrine of *Midwest Piping*. General Counsel cites this language approvingly, in effect arguing that the dismissal of IUMSWA's successorship 8(a)(5) claims does not preclude the existence of a real question concerning representation. That is of course quite correct, and I do not quarrel with such a conclusion. However, it is still necessary for the IUMSWA to raise a claim that "is not clearly unsupportable and lacking in substance," and this in my judgment it has failed to do.

The Board in *American Can*, on the basis of the ALA's long history of bargaining for lithographic employees in a separate unit at the old plant, the transfer of lithographic equipment and work to the new plant, the expected offer of employment to some of the lithographic employees, together with the ALA's repeated claim to represent these employees, found a real substantial question concerning representation of these employees was created.

It is obvious that these facts are far different in significant aspects from the case at bar. Thus unlike the ALA in *American Can*, IUMSWA herein had no history long or otherwise, of collective bargaining in a unit of Jackson's employees. The Board in *American Can*, relied heavily on this fact in finding that the employer unilaterally resolved a substantial representation question, i.e. the unit issue of separate representation for lithographic employees, based in part on a history of such representation in such a unit. No unit or other representation case issue has been presented by IUMSWA's claims which are resolvable by the Board's representational processes.[70]

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[70] The only history of bargaining revealed in the instant record insofar as IUMSWA is concerned, relates to the Brewer unit. Even if it can be assumed,

I note in this connection that the 2nd Circuit in enforcing the Board's order in *American Can*, as set forth *infra*, made it clear that it was not endorsing the Board's practice of adhering to its approach to *Midwest Piping*, where such position has been rejected by several courts of appeals. The Court enforced the Board's order however, primarily on the basis of ALA's bargaining history in a unit restricted to lithographers with American Can. Thus, the Court emphasized that the Board might have determined that a separate lithography unit was appropriate and given the lithographers a choice between the ALA and Steelworkers. It distinguished the various court of appeals cases which refused to enforce Board orders in *Midwest Piping* cases, on the grounds that there was no showing in *American Can* that the Steelworkers represented a majority of employees in the *contested unit* (emphasis supplied), i.e. a unit confined to lithographers, where in fact no lithographers had even been hired at the time the contract was executed. 535 F. 2d at 186, 187.

Here there is no question as to the majority status of ILA in any conceivable appropriate unit,[71] and there is no history of IUMSWA bargaining for any unit of Jackson employees.

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which the record does not establish, that IUMSWA's demands can be construed as a demand for recognition by Jackson for a unit confined to former Brewer employees previously represented by IUMSWA, such a demand would not raise a colorable claim. Such a unit, clearly based solely on the extent of organization, is an inappropriate unit for collective bargaining, and therefore a claim for such a unit can not create a real question concerning representation. *William Penn Broadcasting*, 93 NLRB 1104 (1951).

[71] General Counsel makes the rather puzzling argument that Jackson's recognition of the ILA at a time when no ILA members were employed in the yard establishes an 8(a)(2) violation. This contention is not encompassed by any allegation in the complaint, which alleges only the execution of a contract in September as a violation of the Act, and only because of the existence of a question concerning representation. The complaint makes no reference to the recognition in June or otherwise as a violation, nor does it make any reference to a lack of majority status of ILA at any time. Thus, I find Respondents not to have been on notice of this contention of General Counsel and the issue was not fully litigated. In any event, since I have found the Staten Island facility to be a relocation of the Brooklyn facilities, it is immaterial that no employees were hired for that facility at the time the parties commenced bargaining for a modification of their existing contract. See *Pepsi Cola Bottlers, supra; Western Freight Association*, 172 NLRB 303 (1968).

Moreover, General Counsel's assumption that all these 23 employees would all be deemed to support IUMSWA in bargaining with Jackson is quite dubious. Thus, 21 of these 23 employees were not part of the original crew of Jackson employees hired at the shipyard, and were all hired after the modification contract was executed. These 21 employees were employed by Brewer in the IUMSWA unit, but such employment terminated by May at the latest.[72] Therefore, it is quite conceivable that some or all of these employees may have had interim employment with another employer between their layoffs from Brewer and their hire at Jackson. Thus, I find it difficult to presume in these circumstances that employees hired by Jackson on October 25, a minimum of 6 months after their terminations from Brewer, would still be deemed to support IUMSWA as their collective bargaining agent with Jackson. Such a presumption even if it could be made, is outweighed, rebutted or at least neutralized by a more well established presumption applicable to such employees. That is the well settled principle, that newly hired employees in the collective bargaining unit are presumed to support the incumbent union (the ILA herein) in the same proportion as did Jackson's pre-existing employees.[73] Therefore, I find if anything, that these 21 former Brewer employees would be deemed to support ILA rather than IUMSWA or at worst might be deemed to support neither union. In no event does this record support a finding that they have designated IUMSWA to represent them in bargaining with Jackson.

Assuming arguendo that these 23 employees are presumed to be IUMSWA supporters in connection with their employment at Jackson, I find that their employment by Jackson by October 25 is still insufficient to create a colorable claim on the part of IUMSWA. Contrary to *American Can* and *Hudson Berlind, supra*, 21 of these 23 employees at the time that operations

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[72] As noted above, the record reveals a gradual layoff of Brewer's employees, so that it may be that some or all of these employees were terminated by Brewer some months prior to May.

[73] *Marine Optical, supra; Mass Machine & Stamping Inc.*, 231 NLRB 801 (1975); *Lammert Industries*, 229 NLRB 8951 (1977) enf'd. 573 F. 2d 1223 (7th Cir. 1978).

began at the shipyard, had no reasonable expectation of being hired by October 25 or at any other specific time. Jackson had assured the ILA and committed itself to hire all its bargaining unit employees from its other facilities who wished to transfer, and to additionally offer jobs to those employees on layoff status.[74] Jackson had received some 500 applications for employment from outside sources, including 100 from former Brewer unit employees, which it intended to utilize and in fact did turn to, only after being unable to staff its facility from its own employees. Moreover, although Jackson did anticipate an expansion of work as a result of the opening of the new facility, it could not and did not in September know nor have reason to believe that such an expansion would have occurred by October 25, or any other particular date. In fact, the hiring of these additional employees was necessitated primarily because Jackson acquired one particular job which required expedited handling and the hiring of a large number of employees.

Since General Counsel concedes and the record supports the fact that Jackson employed a representative complement of employees when it commenced operations and executed its modification of the contract, and a substantial majority of employees at the facility consisted of pre-existing Jackson employees, represented by the ILA, any subsequent expansion of business even if anticipated by Jackson at the time the facility opened is immaterial. As the Board has held, "a determination of premature recognition cannot be predicted . . . on a possibility that future conditions may warrant an increase in personnel, or on the basis of an increase in personnel subsequent to the granting of recognition." *Hayes Coal, supra,* at 1163.

The correct test is the *General Extrusion* criteria, which has concedely been met herein, and Jackson's expectation at the time of its purchase that future business conditions would permit it to increase its work force does not require a different result, even though that expectation was realized.[75]

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[74] Jackson had 300-400 W-2 forms from such employees which it used to staff its operations, and which it promised to and did exhaust before hiring from other sources.

[75] *Hayes Coal, supra; Lutheran Homes, supra.*

General Counsel's position herein, when examined carefully runs contrary to the well established principle that assuming a representative complement is employed, employees are entitled to a determination of representational rights at the time operations commences.[76] Thus, General Counsel would urge that on the basis of IUMSWA's demands, based upon its invalid notions of territorial jurisdiction and an unsupported successorship claim, that Jackson should have refused to recognize and bargain with the incumbent ILA who represented a substantial majority of the employees at the shipyard, because of a possibility that Jackson might at some unforseen future time, hire employees who when employed by Brewer months before their potential hiring at Jackson, were represented by IUMSWA, and might therefore wish to have IUMSWA represent them in collective bargaining with Jackson. Such a speculative defense by Jackson to a refusal to bargain charge would hardly be accepted by the Board, and should not be given any more credence when characterized by General Counsel as creating a real question concerning representation under *Midwest Piping*.

Accordingly, I find that none of the factors cited by General Counsel or otherwise appearing in the record, either singly or collectively are sufficient to raise a colorable claim of representation on the part of IUMSWA.

General Counsel during the course of the hearing herein, contended that Jackson's unlawful payments to the ILA demonstrated "a proclivity to deal with the ILA," and was relevant to the *Midwest Piping* issue. No case authority or other argument was presented to support this assertion, and General Counsel's brief makes no mention of this contention, suggesting perhaps an abandonment of such a position. However, since it has been raised and not formally abandoned, I deem it appropriate to consider such a contention.

Preliminarily I know of no theory of Board law which relies upon a "proclivity to deal with a labor organization" to establish

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[76] *Lutheran Homes, supra; Lammert Industries, supra; Marine Optical, supra.*

a violation of the Act. There is nothing unlawful about an employer wishing to continue to deal with an incumbent Union when it relocates its plant, and I do not believe that the payment arrangement as found above, although unlawful, is sufficient in of itself to taint and invalidate the entire bargaining relationship between the parties. Thus, the evidence reveals no connection between the payments and the decision to recognize the ILA at the Staten Island facility nor the decision to modify the existing contract between the parties. I note that the prior contracts between the parties were industrywide agreements, and the modification bargaining was conducted without the participation of any of the individuals involved in the payment scheme. Such bargaining was conducted with the participation of and ratified by unit employees, and consisted of numerous bona fide negotiating sessions with many heated and spirited discussions as well as the normal give and take of good faith bargaining. Although the modification resulted in some reductions in benefits for some employees, such reductions were agreed to in exchange for the promise of increased employment opportunities and decasualization of work, which in fact has resulted from Jackson's move to the new facility. In addition, the contract even as modified, contained higher benefits than the Brewer's contract, which was typical of pierside operations. Moreover the parties pursuant to the reopening clauses in the agreement have subsequently bargained and raised the contractual benefits substantially for the unit employees. I find that the record indicates that notwithstanding the existence of the unlawful payment arrangements, that the employees of Jackson have received at all times material herein, vigorous and effective representative from the ILA.

In my judgment, it would be inequitable, unwarranted and unjustified to set aside this bargaining relationship, solely on the basis of the unlawful payment arrangements.

Accordingly I find that the existence of the unlawful arrangements herein, have not been shown to have affected the parties actions in agreeing to modify their contract and to extend it to

the Staten Island facility, and I do no deem it appropriate nor proper to draw such an inference.[77]

I therefore find that Respondents have not violated the Act with respect to their activities in extending their contract to the shipyard, as alleged in the complaint, and I shall recommend dismissal of these allegations.

Conclusions of Law

1. The Respondent Employer, Jackson, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent Union, ILA, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondents by entering into and carrying out an arrangement, whereby Jackson made payments to the ILA based upon a percentage of business referred to Jackson by the ILA, violated Section 8(a)(1) and (2) and 8(b) (1)(A) of the Act.

4. Respondents did not violate the Act in connection with their execution of an agreement in September 1979 covering employees at the Staten Island facility.

Upon foregoing findings of fact and conclusions of law, and conclusions upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

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[77] Although I consider the parties participation in the unlawful payment scheme to constitute serious violations of the Act, I believe that a cease and desist order would be an appropriate remedy for these violations, and the setting aside of their contract based on this conduct is not warranted. Cf. *Sweater Bee, supra*, where unlawful payments to a Union were but one of the factors relied upon by the Board to rebut the presumption of majority status of the Union, and to set aside an existing collective bargaining relationship.

ORDER:[78]

1. Respondent Employer, Jackson Engineering, its officers, agents, successors and assigns, shall:

A. Cease and desist from:

(1) Entering into, carrying out or maintaining arrangements with Local 1814, International Longshoremens' Association, AFL-CIO, herein called the ILA, whereby it makes payments to the ILA based upon the percentage of business referred to it by the ILA, or otherwise contributing financial or other assistance or support to the ILA.

(2) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under Section 7 of the Act.

B. Take the following affirmative action designed to effectuate the policies of the Act:

(1) Post at its places of business in Staten Island, New York and Hoboken, New Jersey, copies of the attached notice marked "Appendix A".[79] Copies of the notice on forms provided by the Regional Director for Region 29 after being duly signed by Respondent's representative, shall be posted by it, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

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[78] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[79] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(2) Post at the same places and under the same conditions as set forth in (1) above, as they are forwarded by the Regional Director, copies of the Respondent Union's notice marked "Appendix B".

(3) Mail signed copies of this attached notice marked "Appendix A" to the Regional Director for posting at the Respondent Union's offices and meeting halls.

(4) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

2. Respondent Union, Local 1814, International Longshoremen's Association, AFL-CIO, its officers, agents and representatives, shall:

A. Cease and desist from:

(1) Entering into, carrying out or maintaining arrangements with Jackson Engineering Co., herein called Jackson, whereby it receives payments from Jackson based upon the percentage of business referred by it to Jackson, or otherwise receiving or accepting financial or other support and assistance from Jackson.

(2) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

B. Take the following affirmative action designed to effectuate the policies of the Act:

(1) Post at its business offices and meeting halls, copies of the attached notice marked "Appendix B".[80] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized repre-

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[80] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sentative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(2) Post at the same places and under the same conditions as set forth in (1) above, as they are forwarded by the Regional Director, copies of Respondent Employer's notice marked "Appendix A".

(3) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for posting at Respondent Employer's places of business.

(4) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the Complaint be dismissed insofar as it alleges violations not found herein.

Dated, Washington, D.C. May 27, 1982.

Steven B. Fish
Administrative Law Judge

APPENDIX D

265 NLRB No. 175

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JACKSON ENGINEERING CO.

and Case 29—CA—7498

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO AND LOCAL 17, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL—CIO

and

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL—CIO

Party to the Contract

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL—CIO

and Case 29—CB—3966

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO AND LOCAL 17, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL—CIO

and

JACKSON ENGINEERING CO.

Party to the Contract

DECISION AND ORDER

On May 27, 1982, Administrative Law Judge Steven B. Fish issued the attached Decision in this proceeding. Thereafter, Respondent Employer, Respondent Union, and the General Counsel filed exceptions and supporting briefs, and Respondent Employer and Respondent Union filed answering briefs to the General Counsel's exceptions.

The Board has considered the record[1] and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found that, during the period from early 1976 until July 1979, Respondent Employer's president, Seregos, made concealed payments totaling approximately $67,700 to Respondent Union's executive vice president, Anastasio, with the full knowledge and approval of Respondent Union's president, Scotto. These payments, which were made in cash at Respondent Union's office, represented a 10-percent kickback from all business referred to Respondent Employer by Respondent Union. The Administrative Law Judge found, and

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[1] Although none of the parties have objected thereto, we note that the official transcript of proceedings for the October 1980 hearing dates is confusing and duplicative, and, in some instances, contains patently erroneous transcriptions of testimony and arguments of counsel. However, we carefully have reviewed the entire record and find that these errors do not raise any material issues of fact concerning the issues before us. In this regard, we note that the basic facts essentially are undisputed insofar as they relate to the concealed payments which gave rise to the instant 8(a)(1) and (2) and 8(b)(1)(A) charges, and that the transcription errors primarily relate to the *Midwest Piping* doctrine allegations contained in the complaint. See fn. 2, *infra*.

[2] No exceptions were filed to the Administrative Law Judge's dismissal of that portion of the complaint which alleges violations of the standards set forth in *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945). We note, however, that the *Midwest Piping* doctrine recently was modified and redefined by the Board. See *RCA Del Caribe, Inc.*, 262 NLRB No. 116 (1982) (Chairman Van de Water and Member Jenkins dissenting separately), and *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB No. 115 (1982) (Member Jenkins concurring in the result).

we agree, that by such conduct Respondent Employer violated Section 8(a)(2) and (1) of the Act and Respondent Union violated Section 8(b)(1)(A) of the Act. To remedy these violations, the Administrative Law Judge recommended that a cease-and-desist order issue, finding that setting aside the contract executed on September 13, 1979, was not warranted. We find merit to the General Counsel's exceptions to this latter finding.

The Administrative Law Judge found that the relationship between Respondents had its genesis in mid-1975 when Seregos approached Respondent Union and informed Anastasio that he (Seregos) was interested in unionizing his shop. Thereafter, in mid-July 1975, Seregos told Anastasio that Respondent Employer would become a union shop. On this same occasion, Seregos agreed to Anastasio's proposal that Respondent Employer kick back 10 percent of the proceeds of any business obtained for it through Anastasio's efforts. On July 11, 1975, Seregos, pursuant to Anastasio's instructions, wrote a letter to Prudential Lines, which stated that Respondent Employer was a complete union plant affiliated with the International Longshoremen's Association (ILA) and that its employees were ILA members. In late September 1975, after a majority of employees executed authorization cards for the ILA, Seregos executed a memorandum of understanding with the ILA and began to check off dues and forward them to the ILA. Thereafter, in the fall of 1975, Seregos signed an industrywide collective-bargaining agreement with the ILA effective from November 3, 1975, to November 3, 1978. In early 1976, Seregos began making concealed payments to Anastasio pursuant to their kickback agreement. These payments totaled $15,000 in 1976; $16,000 in 1977; $28,700 in 1978; and $8,000 in 1979. The last such payment amounted to $4,000 and was tendered to Anastasio on July 5, 1979.[3] Meanwhile, during the period that these payments were made, Respondents executed a renewal collective-bargaining agreement carrying effective dates of November 3, 1978, to November 2, 1981. In late June or early July 1979, however, following Respondent Employer's purchase of the Staten Island

[3] This payment assertedly was for Scotto's "legal defense fund."

shipyard facility from Brewer Drydock Company, Respondents commenced negotiations concerning modifications to their collective-bargaining agreement. These negotiations culminated in an agreement reached on September 5, which included, *inter alia*, reductions of wage rates for most employees and reductions in company contributions to employees' pension and hospitalization plans.

Thus, it is apparent from the foregoing that at or about the same time Respondents were negotiating midterm contract modifications granting Respondent Employer economic concessions, concealed payments involving large sums of money were changing hands. We find that these concurrent actions operated to taint and undermine the bargaining relationship between Respondents and the contract which was negotiated by them while the payments were being made. Our conclusion in this regard is not affected by the fact that Anastasio, Scotto, and Seregos personally did not engage in the negotiations which led to the modified contract. Although those individuals may not personally have participated, they were, at all material times, Respondent Union's executive vice president and president and Respondent Employer's president, respectively. Under these circumstances, we do not regard their divorce from the actual negotiations to be determinative of this issue.

In sum, we find that in order fully to effectuate the purposes and policies of the Act, and to assure an adequate remedy for Respondents' serious unfair labor practices, the appropriate remedy in this proceeding is that sought by the General Counsel. Accordingly, we shall order that: (1) Respondent Employer withdraw and withhold all recognition from Respondent Union as the collective-bargaining representative of Respondent Employer's employees, unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees; (2) Respondent Employer and Respondent Union cease giving effect to the September 1979 collective-bargaining agreement, or to any modification, extension, supplement, or renewal thereof, unless and until Respondent Union shall have been certified by the Board; and (3) Respondent Employer and Respondent Union,

jointly and severally, reimburse all present and former employees of Respondent Employer, except those who joined or signed authorization cards for Respondent Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in Respondent Union,[4] with interest thereon computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977) (see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)). Nothing in our Order, however, shall be deemed to require Respondent Employer to vary or abandon those wage, hour, seniority, or other substantive features of its relations with employees established in the performance of the aforementioned collective-bargaining agreement, or to prejudice the assertion by the employees of any rights they may have thereunder.[5]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Employer, Jackson Engineering Co., Staten Island, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Entering into, carrying out, or maintaining arrangements with Local 1814, International Longshoremen's Association, AFL-CIO, whereby it makes payments to Local 1814 based upon the percentage of business referred to it by Local 1814, or otherwise contributing financial or other support to Local 1814.

(b) Recognizing Local 1814, International Longshoremen's Association, AFL-CIO, or any successor thereto, as the repre-

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[4] *Unit Train Coal Sales, Inc.*, 234 NLRB 1265 (1978).

[5] *Sweater Bee by Banff, Ltd.*, 197 NLRB 805 (1972).

sentative of any of its employees for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified by the National Labor Relations Board.

(c) Performing or giving effect to its contract of September 1979 with Local 1814, International Longshoremen's Association, AFL-CIO, or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Union, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified by the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Local 1814, International Longshoremen's Association, AFL-CIO, as the representative of any of its employees for the purpose of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union shall have been certified by the National Labor Relations Board.

(b) Jointly and severally with Respondent Local 1814, International Longshoremen's Association, AFL-CIO, reimburse all of its present and former employees, except those who joined or signed authorization cards for said Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in said Union, with interest thereon computed in the manner set forth in this Decision and Order.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its places of business in Staten Island, New York, and Hoboken, New Jersey, copies of the attached notice marked "Appendix A."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Resondent Employer's authorized representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(e) Post at the same places and under the same conditions as set forth in paragraph (d) above, as they are forwarded by the Regional Director, copies of Respondent Union's notice marked "Appendix B."

(f) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting at Respondent Union's offices and meeting halls.

(g) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

B. Respondent Union, Local 1814, International Longshoremen's Association, AFL-CIO, Brooklyn, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(a) Entering into, carrying out, or maintaining arrangements with Jackson Engineering Co. whereby it receives payments from Jackson based upon the percentage of business referred by it to Jackson, or otherwise receiving or accepting financial or other support and assistance from Jackson.

(b) Performing or giving effect to its contract of September 1979 with Jackson Engineering Co., or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Employer, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until it shall have been certified by the National Labor Relations Board.

(c) Acting or purporting to act as the collective-bargaining representative of any employees of Jackson Engineering Co. for the purpose of dealing with said Employer concerning wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until it shall have been certified by the National Labor Relations Board.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Jackson Engineering Co. reimburse all of said Employer's present and former employees, except those who joined or signed authorization cards for Respondent Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after said effective date for initiation fees, dues, or other obligations of membership in Respondent Union, with interest computed in the manner set forth in this Decision and Order.

(b) Post at its business offices and meeting halls copies of the attached notice marked "Appendix B."[7] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Union's authorized representative, shall be posted by Respondent Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in paragraph (b) above, as they are forwarded by the Regional Director, copies of Respondent Employer's notice marked "Appendix A."

(d) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for posting at Respondent Employer's place of business.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

Dated, Washington, D.C. December 28, 1982

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

NATIONAL LABOR RELATIONS BOARD

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[7] See fn. 6, *supra*.

APPENDIX A

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT enter into, carry out, or maintain arrangements with Local 1814, International Longshoremen's Association, AFL-CIO, whereby we make payments to Local 1814 based upon the percentage of business referred to us by Local 1814, or otherwise contribute financial or other assistance or support to Local 1814.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL cease performing or giving effect to our contract with Local 1814, International Longshoremen's Association, AFL-CIO, or to any modification, extension, supplement, or renewal thereof; to any

dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Union, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until said Union, or its successor, shall have been certified as our employees' exclusive collective-bargaining representative by the National Labor Relations Board.

WE WILL cease recognizing Local 1814, International Longshoremen's Association, AFL-CIO, and WE WILL withdraw and withhold recognition from that Union, as our employees' representative for collective-bargaining purposes, until such time as that Union is certified as our employees' exclusive collective-bargaining representative by the National Labor Relations Board.

WE WILL, jointly and severally with Local 1814, International Longshoremen's Association, AFL-CIO, reimburse all of our present and former employees, except those who joined or signed authorization cards for said Union prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after that effective date for initiation fees, dues, or other obligations of membership in said Union with interest.

JACKSON ENGINEERING CO.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or

compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212-330-2862.

APPENDIX B

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT enter into, carry out, or maintain arrangements with Jackson Engineering Co. whereby we receive payments from Jackson based upon the percentage of business referred to us by Jackson, or otherwise receive or accept financial or other support and assistance from Jackson.

WE WILL NOT act or claim to act as a collective-bargaining representative of any employees of Jackson Engineering Co. for the purpose of dealing with said Employer concerning wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until we have been certified by the National Labor Relations Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WE WILL NOT perform or give any effect to our contract with Jackson Engineering Co., or to any modification, extension, supplement, or renewal thereof; to any dues-checkoff cards executed pursuant thereto; or to any other contract, agreement, or understanding entered into with said Employer, or its successor, relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until we have been certified by the National Labor Relations Board.

WE WILL jointly and severally with Jackson Engineering Co., reimburse all present and former employees of Jackson Manufacturing Co., except those who joined or signed authorization cards for us prior to the effective date of the September 1979 collective-bargaining agreement, for moneys paid by or withheld from them on or after that effective date for initiation fees, dues, or other obligations of membership in Local 1814, with interest.

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Fourth Floor, Brooklyn, New York 11241, Telephone 212-330-2862.

APPENDIX E

STATUTES

§ 157. NATIONAL LABOR RELATIONS ACT § 7 *of the Act, 29 U.S.C. 157*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. *From § 8 of the Act, 28 U.S.C. 158*

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

§ 186. Labor-Management Relations (Taft-Hartley) Act, 1947 ***From § 302 of the Act, 29 U.S.C. 186***

(a) Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(d) Penalty for violations

Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, by guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

§ 504. LABOR MANAGEMENT REPORTING and DISCLOSURE ACT ***From § 504 of the Act, 29 U.S.C. 504***

(a) Membership in Communist Party; persons convicted of robbery, bribery, etc.

No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee perform-

ing exclusively clerical or custodial duties) of any labor organization, or

(c) Definitions

For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

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No. 84-358 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly found that the Union's president and vice-president acted as agents of the Union in arranging and participating in a scheme whereby the Company agreed to recognize the Union as the representative of its employees and pay a percentage kickback to the two union officials in exchange for their agreement to obtain business for the Company.

2. Whether the Board's order was a reasonable exercise of its discretion to remedy the unfair labor practice found.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 735 F.2d 1384. The decision and order of the National Labor Relations Board (Pet. App. 111a-124a), including the decision of the administrative law judge (Pet. App. 50a-110a), are reported at 265 N.L.R.B. 1688.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1984. A petition for rehearing was denied on July 23, 1984 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on September 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the Labor-Management Relations Act, 29 U.S.C. 141 *et seq.*, are set forth at Pet. App. 125a-128a. In addition, Section 2(13) of the National Labor Relations Act, 29 U.S.C. 152(13), provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

STATEMENT

1. Jackson Engineering Co. (Jackson or the Company) has been engaged in the business of major ship repairs and renovations at various locations in New York and New Jersey since 1948. Until 1975, its employees were not represented by any labor organization. In 1975, Nicholas Seregos, who was at all relevant times the principal owner and president of the Company, concluded that his efforts to obtain business were hampered by the Company's status as a non-union employer. Seregos had observed over time that potential clients, particularly United States flagships, repeatedly rejected his solicitations on the ground that the Company was not a union shop. Pet. App. 52a-54a; A. 31, 45, 59, 164, 218, 294-295.[1]

Sometime in mid-1975, Seregos telephoned Anthony Anastasio at his union office. Anastasio, secretary-treasurer and later executive vice president of the local that became petitioner International Longshoremen's

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[1] "A." refers to the joint appendix filed in the court of appeals, which includes relevant portions of the record before the Board.

Association Local 1814,[2] was responsible for administering contracts for Local 1814 in the ship repair industry. Seregos expressed interest both in obtaining new business and in unionizing the Company, and the two later met for further discussions. Pet. App. 54a; A. 147, 166-167, 168. At a meeting in early July 1975, Anastasio offered to obtain business for the Company in exchange for a kickback of ten percent of the proceeds. In addition, Anastasio made clear that he would help the Company only on the condition that it unionize. Seregos agreed to both the kickback arrangement and to unionization of the Company's workforce. Pet. App. 54a; A. 169-171, 212-214. Thereafter, at another meeting at Local 1814's office, Anastasio instructed Seregos to write to Prudential Lines, a United States flag line, and on July 11, 1975, Seregos wrote a letter falsely stating that the Company was a union shop and that its employees were members of Local 1814 (Pet. App. 54a; A. 171-173, 215-216).

Local 1814 obtained union authorization cards from the Company's employees on September 15, 1975. Later that month, Seregos signed a memorandum agreeing to recognize the Union, and the Company began to check off employees' union dues and forward them to the Union. Pet. App. 55a; A. 214. Sometime in the fall of 1975, Seregos met with Anastasio and Anthony Scotto, president of Local 1814, at the local's office. Seregos again expressed interest in obtaining more work for the Company, and Scotto said that he could help Seregos get business with United States Shipping Lines. The three men then discussed the

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[2] Anastasio at the time was secretary-treasurer of Local 1277, ILA. Local 1277 and other locals merged into Local 1814 in March 1978, and Anastasio later became executive vice president of that local. It is undisputed that Local 1814 is the successor to Local 1277, and the local hereinafter will be referred to as Local 1814. Pet. App. 54a n.3; A. 33, 72.

method by which Seregos would pay the ten percent kickbacks. Scotto offered to assist Seregos in setting up a foreign corporation for that purpose, but Seregos responded that that would not be necessary. Pet. App. 55a; A. 175-178.

The Company began receiving business from both Prudential Lines and United States Shipping Lines in the early fall of 1975. The Company and Local 1814 signed a multi-employer three-year collective bargaining agreement containing union security and check-off provisions effective November 3, 1975. The contract was signed by Anastasio and Scotto for the Union. Late in the year, Anastasio told Seregos that the kickback payments were to be made in cash, and Seregos agreed. Pet. App. 55a; A. 181, 182, 183-184, 218, 226, 227, 236, 238.

Seregos began making cash payments to Anastasio at the Union's office in early 1976, and payments for that year totaled $15,000. Seregos paid a total of $16,000 in 1977 and $28,700 in 1978.[3] Throughout the period in which the payments were made, Scotto remained president of the Union and Anastasio, who moved from secretary-treasurer to executive vice president (see page 3 note 2, *supra*), continued to exercise chief responsibility for administering Local 1814 contracts in the ship repair industry, including the contract with Jackson Engineering Co. On November 3, 1978, the Company and the Union renewed their collective bargaining agreement for three more years. The contract was executed by Anastasio and Joseph Collazzo for Local 1814 and by Seregos for the Company. Pet. App. 56a-57a; A. 147-148, 184-185, 187, 192-194, 218, 238-243.

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[3] In 1977, Seregos paid Anastasio $5,000 on June 2, $1,000 on October 6, $5,000 on November 17, and $5,000 on December 19. In 1978, Seregos made separate $5,000 payments on February 28, March 23, April 10, May 15, and November 15, and paid $3,700 on July 3. Pet. App. 56a; A. 184-185, 187, 192-194.

In January 1979, Anastasio and Scotto were indicted by a federal grand jury for their receipt of payments from certain employers (not including Jackson Engineering Co.) under contract with Local 1814 (Pet. App. 57a; A. 138). At a meeting in Anastasio's office in early May, Anastasio asked Seregos if any money was due "against the work." When Seregos balked at payment due to the indictment and ongoing investigation, Anastasio assured him that payments should continue to be made, and Seregos paid Anastasio $4,000 on May 8, 1979. Seregos paid an additional $4,000 on July 5 in response to Anastasio's request for a contribution to help pay Scotto's legal fees. Pet. App. 56a-57a; A. 198-203. In a superseding indictment returned on July 31, 1979, Scotto and Anastasio were charged with additional unlawful conduct, including receipt of the payments from Seregos to Anastasio during the period 1977 to 1979 (Pet. App. 57a; A. 139-140).

Meanwhile, in June 1979, the Company had purchased a drydock facility in Staten Island from Brewer Drydock Co. and recognized Local 1814 as the representative of its employees there. Representatives of the Company and the Union thereafter met to discuss modification of the existing contract in view of the Company's purchase of the Staten Island facility.[4] On September 15, 1979, the parties reached agreement on a new contract that provided for reductions in wages and certain benefits for most employees of the Company. Pet. App. 65a; A. 36-37, 96, 105, 110, 111, 119-120, 128, 138-139, 244-291. Scotto and Anastasio did not personally take part in the negotiations, but throughout the period they remained the Union's highest ranking offi-

[4] The Company contended that its purchase of the new facility would result in more steady work for its employees, but that it needed to reduce its labor costs in order to obtain the work that its new drydock facility would allow it to perform (Pet. App. 64a).

cers (Pet. App. 57a). By the time the Company had acquired the Staten Island facility in 1979, both its volume of business and its total number of employees—all members of Local 1814—had grown substantially from the 1975 levels (*ibid.*).

In January 1980, Scotto and Anastasio were convicted in federal court on criminal counts of receiving unlawful labor payments, in violation of Section 302 of the Labor-Management Relations Act (29 U.S.C. 186), and of various counts of racketeering, conspiracy, and tax evasion. More specifically, Anastasio was convicted of unlawfully receiving payments from Seregos, and he was sentenced to two years' imprisonment, five years' probation, and a $50,000 fine. Scotto, who was not indicted with respect to those payments, was convicted on other counts and was sentenced to five years' imprisonment, five years' probation, and $75,000 in fines. At the sentencing proceeding in February 1980, the district judge also ordered that Anastasio and Scotto forfeit their offices in the Union. Pet. App. 58a. The convictions were affirmed in September 1980. See *United States* v. *Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). At about the same time, in a separate state court proceeding, the Appellate Division of the New York Supreme Court affirmed a lower court order directing that Anastasio and Scotto be removed from union office. See *Scotto* v. *Waterfront Comm'n*, No. 558081 (N.Y. Sup. Ct. Sept. 19, 1980), aff'd, 78 A.D.2d 686, 434 N.Y.S. 2d 1004 (1980). They were not replaced as union officers until May 1981 (Pet. App. 59a).

2. The Board, adopting in part the findings and conclusions of the administrative law judge, found that the Company violated Section 8(a)(2) and (1) of the Act, 29 U.S.C. 158(a)(2) and (1), and that the Union violated Section 8(b)(1)(A), 29 U.S.C. 158(b)(1)(A), by participating in the kickback scheme (Pet. App. 82a-89a,

112a-113a).[5] The Board noted that "the parties do not disagree that such payments if made by Jackson to 'a labor organization,' constitute violations of * * * the Act," and that "[t]he key issue * * * is * * * whether Anastasio and Scotto were agents of the [Union] with respect to this conduct" (*id.* at 83a). It determined that Anastasio, as the Union's second highest ranking official, had authority for organizing employees and securing recognition from employers, as well as for executing and administering collective bargaining agreements on behalf of the Union, and that the arrangement for payments and union referrals of business was "not * * * easily divorced from Anastasio's position and responsibilities" (*id.* at 85a). In particular, the Board found that the arrangement was "intimately connected to and arose out of Jackson's decision to recognize and sign a collective bargaining agreement" with the Union and that it substantially furthered the interests of Local 1814 both by extending the Union's repre-

[5] The unfair labor practice proceedings were initiated by Local 17, Industrial Union of Marine and Shipbuilding Workers of America, which had represented employees of Brewer Drydock Co. prior to the acquisition of the drydock facility by Jackson Engineering Co. in 1979. Local 17 filed charges alleging various violations of the Act stemming from refusal to hire former Brewer employees and to recognize Local 17 as the representative of employees at the Staten Island facility, and also alleging that the Company violated Section 8(a)(2) under the Board's rule in *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945), by recognizing Local 1814 over Local 17 while a real question existed concerning representation of the Staten Island employees between the two unions. The Board's General Counsel declined to issue a complaint based on the Company's refusal to hire former Brewer employees and to bargain with Local 17, but issued a complaint on the *Midwest Piping* charge. In addition, the General Counsel's investigation revealed evidence of the kickback scheme, and the complaint alleged a separate violation against the Company and Local 1814 based on that conduct. Pet. App. 69a-74a.

sentation of ship workers and by ensuring the viability of the unionized Company (*id.* at 85a-86a). In addition, the Board noted that the scheme had been devised by Anastasio with the awareness, participation, and approval of Union president Scotto, the local's highest ranking officer (*id.* at 87a). On the basis of these factors, the Board concluded that Scotto and Anastasio had acted as agents of the Union.[6]

The Board's order required the Company and the Union to cease and desist from continuing the unlawful payments. The Board also set aside the parties' September 1979 contract and ordered the Company to cease recognition of Local 1814, and the Union to cease acting as the representative of the Company's employees, until such time as the Union might be certified by the Board.[7] Finally, the Board ordered the Company and the Union, jointly and severally, to reimburse the Company employees who joined the Union after the effective date of the September 1979 collective bargaining agreement for the dues and fees that they had paid to the Union. Pet. App. 114a-116a. In explaining its reasons for setting aside the parties' bargaining relationship and the contract, the Board stated (*id.* at 114a):

> [A]t or about the same time [the parties] were negotiating midterm contract modifications granting [the] Employer economic concessions, concealed payments involving large sums of money

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[6] The administrative law judge found that the Company did not further violate Section 8(a)(2), as alleged in the complaint, under the rule in *Midwest Piping* (Pet. App. 89a-105a). No exceptions to the *Midwest Piping* finding were filed before the Board (Pet. App. 112a n.2).

[7] The Board stated that its order did not require the Company "to vary or abandon those wage, hour, seniority, or substantive features of its relations with employees established in the performance of the * * * collective-bargaining agreement" (Pet. App. 115a).

> were changing hands. We find that these concurrent actions operated to taint and undermine the bargaining relationship between [the Company and the Union] and the contract which was negotiated by them while the payments were being made.

3. The court of appeals enforced the Board's order in full (Pet. App. 1a-47a). The court upheld the Board's findings that the dealings of Anastasio and Scotto with the Company generally were within the scope of their employment, and that the kickback arrangement "both 'tended to accomplish an authorized purpose'—the extension of [the] Union's membership—and was motivated 'to an[] appreciable extent' by furtherance of the Union's interests in dues and payments for pension and welfare benefits, and * * * the extension of its representation of longshoremen" (*id.* at 20a). The court noted that "Anastasio's exercise of his power to steer business to Jackson—a power directly related to and derived from his position within the Union—was directly conditioned on the Employer's recognition of Local 1814" (*id.* at 21a (emphasis omitted)). Accordingly, the court upheld the Board's conclusion that "the acceptance of the money—a prohibited form of employer payment and assistance—by the Union's principal officers is properly attributable to Local 1814, and gave rise to a finding that both the Employer and the Union engaged in unfair labor practices" (*id.* at 27a).

In approving the Board's remedy, the court agreed that "the agreement between the Company, the Union, and the Union's principal officers was completely tainted by fraud and corruption from the very beginning" (Pet. App. 23a). In this circumstance, "the Board, when faced with the egregious pattern of concealed unlawful assistance before it, was justified in ordering a completely fresh start to relations between Jackson and its employees" (*id.* at 27a-28a). The court concluded that (*id.* at 30a)

> the Board's decision represents nothing more than a sensible application of routine remedial practices to a slightly unusual case, and * * * its orders were entirely consistent with the purposes of the Act. The Board's approach is based on * * * restoring the employees to the position they would have enjoyed but for the illegal arrangement.

Judge Wald dissented because in her view there was insufficient "evidence on the record demonstrating a relationship between the individual officers' corruption and the union's representation of its members" (Pet. App. 43a).

ARGUMENT

1. As it did before the Board (Pet. App. 83a) and the court of appeals (*id.* at 15a-16a), petitioner[8] concedes (Pet. 6) that, if the kickback payments in this case were made to the Union or its agents, they constituted unlawful financial assistance to a labor organization in violation of Section 8(a)(2), and the Union's receipt of such payments violated Section 8(b)(1)(A).[9] Petitioner's sole contention with respect to the Board's finding of a violation is thus that (Pet. 6) "no substantial evidence was adduced" under established agency principles to show that Anastasio and Scotto acted as the Union's agents in the kickback scheme. The decision below does not conflict with any decision of this Court or any other court of appeals, and the Board's application of settled principles to particular facts does not warrant this

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[8] The Company has not filed a petition for a writ of certiorari to review the Board's finding that it violated Section 8(a)(2) and (1) (see Pet. i). Insofar as the caption of the petition lists the Company as a petitioner, it is erroneous.

[9] See *American Bakery & Confectionery Workers Int'l Union* v. *NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967); *Sweater Bee by Banff, Ltd.*, 197 N.L.R.B. 805-806 (1972), enforced, 486 F.2d 1395 (2d Cir. 1973). See also *Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 738 (1961).

Court's review, particularly in light of the novel facts presented here. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is no merit to petitioner's contention. It is well-settled that a principal is responsible for the acts of an agent committed within the general scope of the agent's employment. See, *e.g.*, *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 364 (1829); *NLRB* v. *Local 815, International Brotherhood of Teamsters*, 290 F.2d 99, 103-104 (2d Cir. 1961). An agent acts within the scope of his employment "if the principal actually empowered the agent to represent him in the general area within which the agent acted." *International Longshoremen's & Warehousemen's Union*, 79 N.L.R.B. 1487, 1509 (1948) (footnote omitted). Thus, as Congress made clear in Section 2(13) of the Act, 29 U.S.C. 152(13), "whether the specific acts performed were actually authorized or subsequently ratified" is not controlling on the question whether a principal is bound by the acts of its agent. Moreover, even where the agent is motivated by self-interest or engaged in criminal conduct, his acts fall within the scope of his employment so as to bind the principal so long as the agent is motivated by the principal's business purposes "to any appreciable extent" and his acts "tend[] to accomplish an authorized purpose." Restatement (Second) of Agency § 228 & comment b at 504-505, § 236 & comment b at 523-524 (1958).

Applying these established principles, which petitioner does not dispute, the Board, upheld by the court of appeals, reasonably found that Anastasio and Scotto acted as agents of the Union. As the facts found by the Board demonstrate (see pages 2-8, *supra*), the kickback arrangement and unlawful payments thereunder were an integral part of a plan to extend the Union's representation in the ship repair industry and gain recogni-

tion from the Company. Indeed, the Union's agreement to steer business to the Company in exchange for kickbacks was expressly conditioned on the Company's agreement to recognize the Union.[10] That objective was central to the Union's mission and furthered its institutional interests; moreover, it was clearly an objective that Anastasio and Scotto, as the two highest ranking officers, were authorized to accomplish on behalf of the Union. As the court of appeals observed (Pet. App. 21a), "the kickback scheme was a means to an authorized end," and neither the illegality of the means nor the fact that Anastasio and Scotto may have been motivated by self-interest in addition to the Union's interests serves to negate the agency relationship.[11]

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[10] Petitioner contends (Pet. 7 n.4) that the Board did not find the Company's recognition of the Union to be a condition of the kickback arrangement because it did not order reimbursement of all membership dues paid since the date of recognition. This contention is incorrect. The Board expressly found (Pet. App. 54a, 85a-86a & n.44) that the illegal payments were "intimately connected" with the Company's agreement to recognize the Union and that the business referral and kickback agreement was expressly conditioned on recognition of the Union. As the court of appeals noted (*id.* at 41a), the Board's decision to order reimbursement of dues only from the 1979 contract was an exercise of the Board's *remedial* discretion, which in no way affected its finding as to liability based on the agency determination. (Petitioner's contention with respect to the appropriateness of the Board's remedy is addressed *infra*.)

[11] In upholding the Board's agency determination, the court of appeals noted, in addition to the factors relied on by the Board, that the Union's retention of Anastasio and Scotto as union officers after the grand jury indictments, and the fact that Anastasio's receipt of unlawful payments continued after the indictments, supported the inference that the Union had knowledge of and acquiesced in the conduct (Pet. App. 23a). Contrary to petitioner's contention (Pet. 10-12), the court did not hold that a Union will always be held responsible for the corrupt acts of its officers unless it removes them from office immediately upon their indictment. Rather, the court found only that, in the

There is thus no basis for petitioner's broad contention (Pet. 7-9) that under the Board's decision a union will be held to violate Section 8(b)(1)(A) whenever an officer engages in corrupt conduct or violates the anti-bribery provision of the Labor-Management Relations Act, 29 U.S.C. 186. As shown above, the Board's finding of a violation was based on its determination that the officials here acted as Union agents. That determination was in turn based on the connection between the receipt of illegal payments from the employer and the employer's agreement to allow the Union to extend its representation over its employees, thereby bringing the payments within the prohibition of Section 8(a)(2) against unlawful assistance to a labor organization. The principle expressed in the Board's decision is, as the court of appeals recognized (Pet. App. 2a-4a, 41a-42a n.29), limited to these novel facts.

2. Petitioner's attack (Pet. 12-16) on the Board's remedy as punitive and overbroad essentially repeats its erroneous argument that the Board improperly found a violation. Indeed, petitioner concedes (Pet. 12) that the Board's order involves the application of traditional unfair labor practice remedies, and it appears to contend only that they should not have been applied in this case because there was no violation to remedy.

In any event, as the court of appeals made clear (Pet. App. 27a-41a), the Board's remedy in this case—the cease-and-desist order, the termination of the parties' collective bargaining relationship and nullification of the 1979 contract, and the requirement to reimburse dues collected pursuant to that contract—was reasonably re-

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circumstances of this case—in which the conduct was intimately connected with an authorized union purpose—the fact that Anastasio and Scotto were permitted to continue their unlawful conduct after it had become publicly known was further evidence, in addition to the factors relied on by the Board, that they had acted and continued to act on behalf of the Union.

lated to the scope of the violation found and therefore within the Board's broad remedial discretion. See *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346-348 (1953); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 539-540 (1943). As the Board explained (see pages 8-9, *supra*), the close connection between the ongoing corrupt conduct, the Company's decision to recognize the Union, and the subsequent negotiations "operated to taint and undermine the [parties'] bargaining relationship * * * and the contract which was negotiated by them while the payments were made" so as to justify restoring the Company's employees to the position they would have been in but for the illegal arrangement.

Petitioner likewise errs in contending (Pet. 8, 13-15 & n.11) that the Board could not order discontinuance of the bargaining relationship and set aside the contract without showing that an uncoerced majority of employees do not currently wish to have the Union represent them. The Board found that the entire bargaining relationship, including the Company's initial decision to recognize the Union (which occurred before any employees had indicated their preference for the Union's representation), was infected by the Company's concealed unlawful assistance and that the Union's representation of the Company's employees was therefore compromised notwithstanding the willingness of employees currently to designate the Union as their representative.[12] As

[12] Contrary to petitioner's contention (Pet. 8), the Board did not adopt the administrative law judge's finding that the Union actually represented an uncoerced majority of the Company's employees. Although the administrative law judge observed that Local 1814 appeared to represent a majority of the Company's Staten Island employees on the basis of the Company's recognition of the Union at that facility in June 1979, he made that observation only for the purpose of rejecting Local 17's *Midwest Piping* allegations (Pet. App. 79a, 102a, 105a). Because no exceptions to the ALJ's dismissal of the *Midwest Piping* allega-

this Court has recognized, the Board under such circumstances has broad discretion to "reconcile the objectives of eliminating improper employer interference and preserving the employees' full choice of a bargaining representative." *NLRB* v. *District 50, United Mine Workers*, 355 U.S. 453, 461 (1958). The Act envisions a distinct line between labor and management, and under the statutory scheme a collective bargaining representative functions properly only when it is able to represent employees without undue influence by the employer. See *NLRB* v. *Yeshiva University*, 444 U.S. 672, 682 (1980); *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 193 (1981) (Powell, J., concurring in part and dissenting in part). In order to free the collective bargaining process of the effects of an employer's unlawful assistance, the Board, with court approval, often has ordered the employer to withhold recognition from the assisted union until such time as it may be certified by the Board. See *NLRB* v. *District 50, United Mine Workers*, 355 U.S. at 458-459; *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. at 539-541; *International Association of Machinists* v. *NLRB*, 311 U.S. 72, 75 (1940); *NLRB* v. *Newport News Co.*, 308 U.S. 241, 248-251 (1939).

In line with these principles, the purpose of the order entered in this case is to allow the effects of the unfair labor practice to be dissipated, and this purpose is unaffected by the current desires of the Company's employees. After the effects have been dissipated, if a major-

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tions were filed with the Board, the Board had no occasion to pass on the ALJ's finding in that context. It is clear, however, that, in finding that the kickback scheme was violative of the Act and in fashioning an appropriate remedy for that violation, the Board implicitly overruled the ALJ's finding of an uncoerced majority by concluding that the scheme and the payments thereunder tainted and undermined the bargaining relationship between the Union and the Company (Pet. App. 113a-114a).

ity of the Company's employees wish to be represented by the Union, they will be free to choose the Union as their bargaining representative in a Board-conducted election.[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] See *NLRB* v. *District 50, United Mine Workers*, 355 U.S. at 458-459; *NLRB* v. *American Beef Packers, Inc.*, 438 F.2d 331, 333-334 (10th Cir.), cert. denied, 403 U.S. 919 (1971); *NLRB* v. *Vernitron Electrical Components, Inc.*, 548 F.2d 24, 27 (1st Cir. 1977); *American Bakery & Confectionery Workers Int'l Union* v. *NLRB*, 379 F.2d 160, 163 (D.C. Cir. 1967).